

United States
Circuit Court of Appeals

For the Ninth Circuit. 7

DALLAS MACHINE & LOCOMOTIVE WORKS,
INC., a corporation,

Appellant,

vs.

WILLAMETTE-HYSTER COMPANY, a corpo-
ration, and CLARK & WILSON LUMBER
COMPANY, a corporation,

Appellees.

Transcript of Record

In Three Volumes

VOLUME II

Pages 407 to 804-b

Upon Appeal from the District Court of the United
States for the District of Oregon.

FILED

JAN 23 1940

United States
Circuit Court of Appeals

For the Ninth Circuit.

DALLAS MACHINE & LOCOMOTIVE WORKS,
INC., a corporation,

Appellant,

vs.

WILLAMETTE-HYSTER COMPANY, a corpo-
ration, and CLARK & WILSON LUMBER
COMPANY, a corporation,

Appellees.

Transcript of Record

In Three Volumes

VOLUME II

Pages 407 to 804-b

Upon Appeal from the District Court of the United
States for the District of Oregon.

JOHN LANDON WATERS

was thereupon produced as a witness in behalf of the complainant herein, and, having first been duly sworn, was examined and testified as follows: [394]

Direct Examination

By Mr. Geisler:

The Master: State your name and address.

A. John Landon Waters, at Dallas, Oregon.

Q. (By Mr. Geisler) What is your connection with the plaintiff in the suit?

A. I am the General Superintendent of the Dallas Machine & Locomotive Works.

Q. What has been your experience with regard to mechanical construction?

A. I have been—I was employed eight years for the Oregon State Highway Department, previous to eight years with the Dallas Machine Works. Three years prior to that I was with Vick Brothers Garage in Salem, Oregon.

Q. What experience have you had with the reading of patents and studying of inventions described by patents?

A. During the time that I have been with the Dallas Machine & Locomotive Works I have assisted in the applications for patents procured by that company.

Q. Have you studied the patent here in suit, Plaintiff's Exhibit Number 2? A. Yes, sir.

Q. And are you familiar with it?

A. Yes, sir.

(Testimony of John Landon Waters.)

Q. Have you studied the booklet put out by the defendant under the title "Service Manual"?

A. Yes.

Q. The defendant Willamette-Hyster Company, I mean? A. Yes, sir.

Q. Are you familiar with the construction which is shown in the manual, with regard to the mechanism provided for the raising and lowering of the lumber carrying devices and the control of such devices? [395] A. Yes, sir.

Q. Did you have a drawing made, an enlarged drawing, of those devices, Mr. Waters?

A. Yes.

The Master: Well, is it admitted that the Willamette-Hyster Company is merely a changed name of Willamette-Ersted Company?

Mr. Fryer: Yes, it is so alleged in the pleadings and we don't question that, but each company puts out its own—but that organization has at different times put out different circulars and different literature, and they are not all identical.

The Master: Well, I would take it that the defendant ought to be familiar with its own literature.

Mr. Fryer: Oh, we are, your Honor.

Mr. Geisler: Well, I will proceed with the examination, then?

The Master: All right.

Q. (By Mr. Geisler) I show you here a pamphlet entitled "Service Manual", put out by the defendant Willamette-Hyster Company. Have you seen that Manual before? A. Yes, sir.

(Testimony of John Landon Waters.)

Mr. Fryer: We have no objection to the Service Manual presented to the witness by counsel, and we understand it to be offered in evidence by plaintiff. If not, we would like to offer it ourselves.

Mr. Geisler: It will be offered by the plaintiff in evidence. I ask that it be received and marked now.

The Master: It becomes Complainant's Exhibit number 32.

(Said Service Manual of Willamette-Hyster Company was thereupon received in evidence and marked Complainant's Exhibit 32.)

Q. (By Mr. Geisler) Now, Mr. Waters, have you studied the devices which are shown on pages 4 and 5 of this Exhibit 32? A. Yes, sir.

[396]

Q. Have you compared that device as shown in these drawings with the plaintiff's patent?

A. I have.

Q. Can you tell us by referring to the devices shown and described in the Service Manual what if any connection or bearing they have on the plaintiff's patent?

A. May I have this on the stand, also, so we can refer to the two of them together?

The Master: By the way—I didn't get it—is that Willamette-Ersted or Willamette-Hyster?

A. Willamette-Hyster. Do you wish that I go through the two of them together, or compare them one with the other?

(Testimony of John Landon Waters.)

Q. (By Mr. Geisler) No. Be seated; I want to ask you another question. Have you examined the Hyster put out by the—or lumber carrier, I meant to say, put out by the defendant Willamette-Hytser Company and which the plaintiff claims is an infringement upon its patent?

A. Do you mean the carrier, the complete carrier?

Q. Yes. A. Yes, I have.

Mr. Geisler: Do these drawings, which are enlargements—those are photostatic enlargements. You will concede that, will you?

Mr. Fryer: Yes, we concede that the structures shown in the black lines in the two charts before the witness truly and correctly represent the construction found in the defendant Clark & Wilson's Willamette-Hyster elevator.

Mr. Geisler: May I have those marked for identification, your Honor?

The Master: Drawing number 1 becomes Complainant's Exhibit 33. [397]

(The enlarged drawing referred to was thereupon marked for identification Complainant's Exhibit 33.)

The Master: Drawing number 2 becomes Complainant's Exhibit 34.

(The enlarged drawing referred to was thereupon marked for identification Complainant's Exhibit 34.)

Q. (By Mr. Geisler) Now, look at Exhibits 33 and 34 and tell us whether those exhibits show pic-

(Testimony of John Landon Waters.)

torially the hoisting mechanism and control thereof substantially as incorporated in the lumber carrier put out by the Willamette-Hyster Company and charged to infringe the patent in this suit?

A. Yes, I think they do.

Q. Are they accurate drawings or——

A. They are diagrammatic drawings, or schematic drawings, I should say.

Q. Now, having reference to the elements of the claim here in suit—in the first place, the first element, or claim 4, is a lumber carrier comprising the claim. As to that, of course, there is no question. Now, take the next element——

Mr. Fryer: Is that part of your question, Mr. Geisler, or is that a statement by counsel?

Mr. Geisler: Well, I wondered if there is any question. You don't question the fact that the lumber carrier contains a claim, do you?

Mr. Fryer: Oh, no. I didn't know you were addressing a question to me. I thought you were interrogating the witness, but if you are asking me I will concede that both machines contain a frame.

Mr. Geisler: Yes, that is what I meant. Thank you.

Q. (By Mr. Geisler) Now, referring to the next element, the load-lifting means marked therein: Now, will you, with reference to the drawings plaintiff's Exhibits 33 and 34, point out those load-lifting means? [398]

A. Well, the drawings in their entirety show that they all pertain to the load-lifting means, com-

(Testimony of John Landon Waters.)

prise the load-lifting means.

Q. I see. Well, explain the parts by the reference characters shown on those drawings, and also by comparison with similar devices shown in plaintiff's patent drawings and specifications.

A. The drawing number 1 indicates the reversible clutch which transmits the power and motion from the source of power to the load-lifting means.

Q. Please refer to the——

A. Referring to the drawing number 1, it comprises—this portion colored orange comprises the clutch, reversible clutch.

Q. Pardon me, refer to the letters which are given on it.

A. Well, the letters,—that comprises letters T, C, P, F, Q, M, I, A and S. All those letters refer to the hoist clutch, the different parts of the hoist clutch itself as a unit.

Q. Now, please explain the operation, the construction and operation, of that hoist clutch.

A. In operation, in order to engage the clutch the lever HL in drawing number 2 is moved in either direction, depending on the motion required. It in turn through the levers and arms IS and IL and L and FSL rocks the frame M by means of shaft S.

Q. Now, before you go any further would you please show similar parts that you refer to in the patent in suit, by letters——

A. The corresponding marks on Patent number 1457025 are indicated by numbers 47, which indicates the clutch, number 70, which indicates the

(Testimony of John Landon Waters.)

hand lever, and number 48, which indicates the controls from the land lever to the clutch. That takes us up—those parts are equivalent to the parts up including everything in red and everything shown in orange here.

Q. (By Mr. Geisler) Now, proceed, and from time to time show the parts in the patent which in your opinion are similar to the parts shown in these drawings, Exhibits 33 and 34. [399]

A. When this lever HL has been moved to engage the clutch it simultaneously releases the brake indicated by letters K, U, O, E, D, BR, B, N, and J.

Q. Explain what you mean by “releases the clutch”. I mean the movement which takes place.

The Master: Releases the brake, wasn't it?

A. We release the brake.

Mr. Geisler: I mean release the brake.

A. The operation of the brake is controlled by the letters B, N, J and B, and also E, U being a support or guide for this number E. When the letter HL has been moved it moves the cam J, causing the brake or this ball M to be moved from the groove, from the cam, thus causing this shaft BR to move toward the clutch.

The Master: The clutch?

A. Yes. That pivots on the point shown as—there is no number given, but it pivots on this point and releases a brake——

Q. (By Mr. Geisler) What pivots on the point?

A. The arm U.

Q. Proceed, please. What is the effect, then, of pivoting on the——

(Testimony of John Landon Waters.)

A. Well, that,—I say when the clutch is engaged that disengages the brake, allowing a movement of the clutch in the lift mechanism. When the lift mechanism has reached its limit of travel in either direction, the parts GB, being a rod upon which stops LS are fastened, contact the part EB, which is secured to the screw, a lifting screw, causing the rod GB to return the lever HL to its neutral position, thus disengaging the clutch and applying the brake by the means of the parts mentioned before.

Q. What is the member that engages with those stops LS on the rod GB?

A. I beg your pardon, you mean which is the member that EB—

Q. Yes. [400] A. EB contacts LS.

Q. EB is the part which contacts with the part LS? A. Yes.

Q. And how is that part EB moved?

A. It is moved by the nut on the lifting screw of the hoist mechanism. There is no number, identification number, on the screw in this drawing.

Q. You might mark it an identification number with a pencil, will you, please.

The Master: Mark it D—is there a D on that?

A. Yes, there is.

Mr. Fryer: You might give it a number.

The Master: All right, give it 1, number 1.

Q. (By Mr. Geisler) Is that on the screw that— A. That is the nut.

Q. Now, you might mark one—

A. Do you wish one on the screw also?

(Testimony of John Landon Waters.)

Q. If you please. A. Number 2?

The Master: Yes.

Q. (By Mr. Geisler) Now, state whether or not that screw numbered 2 is rotated?

A. Yes, the screw number 2 is rotated when the clutch is applied.

Q. What rotates it?

A. That is rotated by means of a chain, which is not shown on the drawing, but operates on a sprocket—it has no number, either—there is a chain operates from a sprocket to a sprocket connected to the screw. Those parts are not shown on the drawing.

Q. What is the source of power which is applied to that screw 2?

A. I don't quite understand your question.

Q. What is the source of power, by what source of power is that screw 2 operated?

A. By the power transmitted from the source of power through [401] this clutch, reversible clutch.

Q. I see; it must go from the source of power through the clutch to the load-lifting screw. And what raises and lowers the load-carrying rods?

A. The nut 1 is secured by a linkage to bell lever Z, which is in turn connected with the lifting shoes by the rod indicated but no number being shown.

Q. Did you make any photograph of the defendant Hyster machine, lumber carrier, which shows similar parts? Q. Yes, sir.

(Testimony of John Landon Waters.)

The Master: Am I right in assuming that screw 2 in drawing 2 is horizontal?

A. Yes, sir.

The Master: And it merely serves to actuate the leverage Z?

A. Yes, sir.

The Master: Which lifts the shoe?

A. Yes, sir.

The Master: Or lowers the shoe, depending upon which way——

A. That is right.

The Master: And in lifting the shoe that lifts the load, or supports the load?

A. Well, lifting the shoe supports the load being lifted.

The Master: That takes the place, then, of the rack and pinion in your device?

A. Yes, sir.

Q. (By Mr. Geisler) Identify what that is, that photo. Please show it to him.

A. That is a photograph of the machine in question, Willamette-Hyster's.

Mr. Geisler: I offer that as evidence, your Honor.

Mr. Fryer: I think there is not sufficient foundation yet, your Honor, to show what particular machine this is.

The Master: I think you are right. I will mark it for identi- [402] fication, but counsel may further examine.

(Testimony of John Landon Waters.)

(The photograph referred to was thereupon marked for identification Complainant's Exhibit 35.)

Q. (By Mr. Geisler) Of what machine is that a photograph, Mr. Waters?

A. Do you mean the location of the machine, where we obtained——

Q. No, what particular machine did you take that photograph of?

A. That is a photograph of a machine located at Chambers Lumber Company, at Cottage Grove.

Q. Do you know, have you any idea as to who was the manufacturer of that machine?

A. Willamette-Hyster are the manufacturer. I believe there is a name plate on the machine indicating such.

Q. Now, state whether you compared that with the Service Manual here of the defendant Hyster company?

A. Yes, sir, I have.

Mr. Fryer: We have no further objection to the photograph, your Honor.

The Master: It may be received as complainant's Exhibit 35.

(The photograph heretofore marked for identification Complainant's Exhibit 35 was thereupon received in evidence.)

Q. (By Mr. Geisler) Now, please state whether that photograph shows the bell crank Z that you have referred to?

(Testimony of John Landon Waters.)

A. Yes, this shows the bell crank Z very plainly. That shows the connection of this rod with the lifting shoes.

The Master: The rod on the lower end of Z?

A. Yes.

The Master: Attached to the lower end of Z.

Mr. Geisler: You might give that rod for identification a number, if the Court will permit that,—number 3.

A. Three.

The Master: Is there any objection to marking on this photograph those things which I have——

Mr. Fryer: None whatever. [403]

The Master: This may go to the District Court, who would not have the opportunity of hearing the witness.

Q. (By Mr. Geisler) Will you describe the operation of the clutch and the application of the brake during the raising and lowering movements of the——

A. On movement of lever HL the clutch, reversible clutch, is engaged by means of the various levers before mentioned indicated in red. When they are in an engaged position the brake mechanism as before described shown in purple is disengaged, allowing free movement of the lifting device. Upon reaching the limit of travel in either direction the parts as indicated here in yellow, these that we described a few minutes ago, return this lever HL to a neutral position, thus returning the clutch to

(Testimony of John Landon Waters.)

a neutral position, disengaging the clutch and applying the brake simultaneously.

Q. Then please state what in your opinion the clutch-operating and brake-applying devices correspond with as far as the plaintiff's patent is concerned?

A. I believe I have explained as far as the manual control is concerned, so in the—from the engaged position, after the lever 70 as indicated in our patent 1457025 is in the engaged position the load-lifting means are connected with the source of power by means of the clutch. When they have reached their limit of travel the lever,—or, rather, the stop 65 shown on the patent contacts the bell lever 66, causing arm 64 to pivot on point 63, thus moving the opposite end of the arm 64, which is numbered 48, causing the clutch to return to a neutral position and causing lever 74 and 76 to apply the brake, which is indicated in Figure 4 by the number 77 as being the brake member 66 contacts, exerts pressure on the shaft 77, causing the brakeage on that shaft.

Q. State specifically what the part marked LS and LS, which [404] I understand you have designated stops, in drawing number 2, plaintiff's exhibit 34, are the equivalent of in the plaintiff's patent?

A. Yes, they are the equivalent mechanism.

Q. Of what?

A. They perform the same function—

Q. As what part?

(Testimony of John Landon Waters.)

A. As our part 65, and, also, I hadn't fully described this yet on the crossbar 67 of the patent '025; when a load contacts this crossbar 67 it causes that bar to pivot on point 68 shown in Figure No. 1, thus causing cam 69 to return the lever—to move lever 48, thus returning the clutch to a neutral position.

Q. Then, as I understand, one of those stops LS performs the same duty as that part 65-66?

Mr. Fryer: Now, if Your Honor please, I am not objecting to the leading character of the examination here—it may save time—but I wish to call attention to it so that I may be afforded the same latitude in the examination of our witnesses for the same purpose of saving time.

The Master: Proceed.

A. Would you state that question again?

(The question was thereupon read.)

A. Yes. 65 and 66, yes.

Q. (By Mr. Geisler) Now, is there a part in the defendant's device shown in this exhibit 34 which performs the same duty as the part 67 of the plaintiff's patent? Look at the patent and see.

A. Well, they are both—yes, there is a stop, one of the stops, LS, causes the load-lifting means to disengage in the upward travel of the load-lifting means. 67 performs the same function. It throws the mechanism, returning the clutch to the neutral position upon the upward travel of the load-lifting means.

(Testimony of John Landon Waters.)

Q. Now, recapitulating with regard to the elements which are [405] set forth in the claim 4 of the plaintiff's patent in suit, do you find in the defendant's lumber carrier as schematically illustrated by these drawings, plaintiff's exhibits 33 and 34, load-lifting means mounted in such a carrier?

A. Yes, sir, we do.

Q. Do you find therein means for transmitting motion from a source of power to the load-lifting means?

A. Yes, sir.

Q. Comprising the clutch?

A. Yes, sir.

Q. That can be set in neutral position or to cause the load-lifting means to move in either direction?

A. Yes, sir.

Q. Do you find therein means for manually moving the clutch to operative position?

A. Yes, sir.

Q. Do you find therein means for automatic—automatic means for moving the clutch to neutral position upon the movement of the load-lifting means to a predetermined extent in either direction?

A. Yes, sir.

Q. Do you find therein a means for braking the transmitting means whenever the clutch is moved to neutral position?

A. Yes, sir.

Q. (By Mr. Geisler) Now Mr. Waters, I am asking you also to state specifically whether the elements of the claims that I shall enumerate were found by you in the machine manufactured and sold by the Willamette-Hyster Company?

A. Yes, they are all there.

(Testimony of John Landon Waters.)

Q. I will ask you specifically, did you find a machine load-lifting means mentioned therein?

A. Yes. [406]

Q. Did you find therein means for transmitting motion from a source of power to the load lifting means comprising a clutch? A. Yes, sir.

Q. That can be set in neutral position or to cause the load lifting means to move in either direction?

A. Yes, sir.

Q. Means for manually moving the clutch to operative position? A. Yes, sir.

Q. What are those means for moving the clutch to operative position?

A. The means for moving the clutch to operative position comprise the parts indicated in red on drawing No. 2.

Q. Did you find in that particular lumber carrier automatic means for moving the clutch to neutral position upon a movement of the load lifting means to a predetermined extent in either direction?

A. Those means are indicated in the portion colored yellow.

Q. Well, did you find those?

A. Yes, sir, I did.

Q. Did you find means for braking the transmitting means whenever the clutch is moved to neutral position? A. Yes, sir, I did.

Q. Did you examine the lumber carrier which is being operated at the Clark & Wilson Lumber Yard? A. Yes, sir.

(Testimony of John Landon Waters.)

Q. Now with reference to that particular carrier there, were there any identification marks on it, as to who made it?

A. Yes; there was a name plate indicating the manufacturer.

Q. By whom?

A. Willamette-Hyster Company.

Q. Now with reference to these particular elements that I just enumerated with reference to claim 4 of the patent, state whether or not all those elements were included in that machine, or if any of them were not included state which were not included. [407]

A. They were all included.

Q. I will ask you to look at this photo and state who made it and what it represents.

A. I made this photograph from the lifting mechanism from one of the earlier carriers manufactured, I believe the fourth machine manufactured by the Dallas Machine & Locomotive Works.

Q. Was the drawing, Plaintiff's Exhibit No. 6—would you kindly show that to him, Mr. Bailiff—made from this lifting mechanism that you referred to?

A. Yes, sir. The drawing No. 6 was made from the elements or from the parts shown in this photograph.

Q. What is that a close-up view of particularly?

A. It is a close-up view of the clutch and the automatic brake and a portion of the controls.

Mr. Geisler: We offer that in evidence.

Mr. Fryer: I have no objection.

(Testimony of John Landon Waters.)

The Master: It will become complainant's Exhibit No. 36.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 36.)

(A detail sketch was thereupon received in evidence and marked Complainant's Exhibit 37.)

Mr. Geisler: You may cross examine.

Mr. Fryer: We reserve cross examination of this witness until the conclusion of the cross examination of the witness Gerlinger.

Mr. Geisler: Mr. Gerlinger is now here, your Honor.

The Master: You may be excused for the time being, Mr. Waters. Mr. Gerlinger, take the stand.

(Witness excused.)

CARL F. GERLINGER

thereupon resumed the stand as a witness in behalf of the complainant herein and, having been previously sworn, was examined and further testified as follows: [408]

Cross Examination

By Mr. Fryer (continued):

Q. Do you recall two hydraulic machines which we were talking about at the conclusion of your cross examination which had been sold by the plain-

(Testimony of Carl F. Gerlinger.)

tiff to the defendant Clark & Wilson Lumber Company? A. Yes, I do.

Q. When your company sold these two hydraulic carriers to the defendant Clark & Wilson Lumber Company, did you learn anything about the lumber carriers which the Clark & Wilson Lumber Company was then using? A. No.

Q. You didn't know whether or not they had ever used any lumber carriers before when you sold them those two hydraulic carriers; is that true?

A. Well, I even don't remember that, even if they had any carrier before.

Q. After you sold them the two hydraulic carriers, which I believe you stated was some time in 1923 or 1924, did you ever after attempt to sell Clark & Wilson Lumber Company any further carriers? A. No, no, not for a long while.

Q. The defendant Clark & Wilson Lumber Company, according to your understanding, is a fairly large size lumber concern near Portland?

A. Yes.

Q. They were a pretty good prospective customer for your carriers?

The Witness: Let me get that, please.

(Last question read.)

A. I wouldn't say that.

Q. You didn't consider Clark & Wilson Lumber Company a good customer for any of your carriers at any time after you sold them your two hydraulic carriers; is that correct?

A. That is correct, yes. [409]

(Testimony of Carl F. Gerlinger.)

Q. So that you never went back to them after selling them these two hydraulic carriers, with any attempt to sell them any further carriers; is that true? A. Not personally, no.

Q. No one in your company ever did that, either, did they? A. Oh, yes; yes; yes.

Q. Oh, they did? At what time?

A. I couldn't tell you.

Q. Well, how do you know that anyone in your company did try to sell Clark & Wilson Lumber Company, then?

A. Well, I know there were ones, when they would go down they would sure call on them.

Q. And can you recall the first instance in which some one from your company went to call on the defendant Clark & Wilson Lumber Company to sell them a lumber carrier after they purchased two of your hydraulic carriers? A. No.

Q. How long ago was it, roughly, would you say?

A. Oh, I couldn't say; I couldn't say. I just make a guess at it.

Q. Well, what is your best guess?

A. Oh, a year, about a year ago. That is just a guess, about a year ago—about a little bit over a year.

Q. You never at any time during your acquaintance with the Clark & Wilson Lumber Company, occasioned by your selling them two hydraulic carriers, gained any knowledge of the fact that the defendant Clark & Wilson Lumber Company was

(Testimony of Carl F. Gerlinger.)

using Ross carriers at its plant near Portland, did you?

A. I know they used Ross carrier later on, after they bought the hydraulic.

Q. How did you come to know that?

A. Well, through the men reporting it to me.

Q. "Through the men reporting it to me." What is the first occasion that you recall when any of your men reported to you that [410] defendant Clark & Wilson Lumber Company was using Ross carriers at its plant?

The Witness: Read me this question, please.

(Last question read.)

A. Oh, after—I say after we, a year or two after we sold the carriers, the hydraulic carriers to them.

Q. Who was it that reported the fact to you a year or two after Clark & Wilson bought your hydraulic carriers that they were using Ross carriers at their plant?

A. I couldn't say that.

Q. When the fact was reported to you a year or two after Clark & Wilson bought your hydraulic carriers that that company was using Ross carriers, did you make any effort to see the construction of those Ross carriers? A. No.

Q. Did you have anyone report to you anything concerning the construction or operation of those Ross carriers in use by defendant Clark & Wilson Lumber Company at that time? A. No.

Q. Is it your testimony that no one ever reported to you anything concerning the construction and

(Testimony of Carl F. Gerlinger.)

operation of the Ross carriers in use by the defendant Clark & Wilson Lumber Company at or after the time that you sold Clark & Wilson your hydraulic carriers?

A. Oh, I wouldn't say that, but I don't remember.

Q. As a matter of fact, Mr. G. A. Grab, who was then working for you, called your attention to the fact that Clark & Wilson were using Ross carriers, didn't he?

A. That might be true, but I don't remember he did.

Q. And it is also true that at the time that your two Ross carriers, your two hydraulic carriers, were sold to Clark & Wilson Lumber Company Mr. Grab, then in your employ, called your attention to those Ross carriers, pointed out to you that they contained upper and lower automatic limit stops and automatic [411] brake, and inquired whether or not such machines were not an infringement of your patent in suit; is that true?

A. That is not true.

Q. Mr. Grab never made any such statement to you at any time; is that right? A. No.

Q. When news of the use by defendant Clark & Wilson of Ross carriers was communicated to you, you were sufficiently familiar with your competitor's machine known as the Ross carrier to know that that machine contained automatic upper and lower limit stops and an automatic brake for the load lifting means; is that true?

(Testimony of Carl F. Gerlinger.)

A. No, I didn't know it.

Q. When did you first learn that the Ross carriers contained automatic upper and lower limit stops for the lifting means and an automatic brake?

A. In 1935.

Q. And the Ross carrier has been sold in competition with your carriers ever since 1922 or '3 and you never learned until 1935 that any of those carriers contained automatic upper and lower limit stops and brakes; is that true?

A. That is true.

Q. You know the construction of Clark & Wilson carriers at this time, do you?

A. Fairly well.

Q. I show you a group of three photographs and ask you to state whether or not you recognize the machine appearing thereon as one of the Ross lumber carriers which you have been talking about?

A. Yes, they are Ross carriers.

Mr. Fryer: I now ask to have marked for identification the three photographs identified by the witness in the order of the next exhibits, 38, 39 and 40; or it has been suggested they be marked 38-A, B and C, perhaps, since they are all one machine.

[412]

The Master: They will be so marked.

Mr. Fryer: I am handing your Honor copies of each of the Exhibits 36-A, B and C, arranged so that you may place them in this folder, which I shall now hand you, in order that you may have a complete copy of the exhibits as they go in.

(Testimony of Carl F. Gerlinger.)

The Master: The exhibits 38-A, B and C have been marked for identification.

(The three photographs were thereupon marked for identification Respondents' Exhibits 38-A, 38-B and 38-C, respectively.)

Q. (By Mr. Fryer) Will you now look at the photographs of the Ross carrier, Exhibits 38-A, B and C, and state whether the mechanism shown in red on those photographs is what you understand is contained in that machine to move the clutch to neutral whenever the load lifting means reaches a predetermined position in either direction.

A. I wouldn't say that. That don't show plain enough here.

Q. Do you know what the automatic stop mechanism of the Ross carrier looks like?

A. Look like; yes, about.

Q. Well, can you state whether the parts colored red on the photographs——

A. Yes, it looks like it.

Q. Exhibits 38-A, B and C— A. Yes.

Q. Are the automatic stop mechanism of the Ross carrier?

A. Well, I wouldn't say. It look like it.

Q. Now will you state whether the parts on the photographs, Exhibits 38-A, B and C, which are colored orange, look like what you understand to be the automatic brake of the Ross carrier construction.

(Testimony of Carl F. Gerlinger.)

A. I wouldn't say that is the automatic—I mean that is the screws and the shaft, what I see in orange. [413]

Q. I call your attention to the photograph 38-C and the orange drum and brake band appearing on that photograph, together with the orange colored linkage moving to the clutch actuating lever and ask you to state whether that orange colored structure is what you understand is employed in the Ross carrier for automatically applying the brake?

A. That don't show close—that doesn't show close enough to tell; that is, if this works automatic.

Q. You do understand, however, that the Ross carrier contains a brake which is automatically applied? A. Yes.

Q. When the clutch is placed to neutral; is that true?

A. That is true on the last model; I mean the last one what I saw.

Q. Was that sort of a brake mechanism lacking or missing in any Ross carrier which you have seen?

A. Well, I didn't see many; I didn't inspect just—personally I didn't inspect more than two or three.

Q. Of the two or three Ross carriers which you have inspected, which was the first one that you recall inspecting?

A. I look one—the first Ross carrier I look at, it was back in 1919.

Q. Was that a straddle truck?

A. That was an electric carrier, yes.

(Testimony of Carl F. Gerlinger.)

Q. It was a straddle truck for hauling lumber?

A. Yes, electric carrier.

Q. What sort of motive power did it have; electric motor?

A. Electric motor and storage battery, yes.

Q. Where did you inspect that Ross carrier in 1919?

A. At Portland here.

Q. In Portland, Oregon?

A. Yes.

Q. Now what Ross carrier is the next one which you say you inspected? [414]

A. Well, I couldn't say that, what the next one.

Q. After seeing this one in 1919 in Portland, you saw some others subsequent to that time?

A. Yes.

Q. But you don't remember when; is that it?

A. I saw lots of them just go by but I didn't inspect them.

Q. You saw them going by in the various lumber yards?

A. Yes, like the Eastern & Western or another mill, but I didn't inspect them.

Q. How close were they to you when they went by you, driving by on the street?

A. Oh, just drive by and——(witness pauses)

Q. Referring to the defendant Clark & Wilson's Willamette Carrier, which you state you believe infringes claim 4 of your patent in suit, did you examine a circular in connection with that machine in order to come to that conclusion?

(Testimony of Carl F. Gerlinger.)

A. No. I went to Portland with Mr. Waters, our General Superintendent, in September, about the end of September, 1935.

Q. If I correctly understand your previous testimony, you stated that you learned the construction of the Willamette-Hyster's machine by the inspection of circulars and also by the inspection of the machine. Now do you recall what circular you referred to in your testimony there?

A. The manual.

(Mr. Fryer indicated a book to the witness)?

The Witness: Yes.

Mr. Fryer: May the witness be shown Exhibit 37, please, the manual, of the Willamette-Hyster—32, rather.

Q. I show you Plaintiff's Exhibit 32 and ask you to state whether or not that is the manual which you refer to as the one which showed you the construction of the Willamette-Hyster machine.

A. Yes.

Q. And I suppose that the achematic drawings or illustrative [415] drawings on pages 4 and 5 of that circular is the part of the circular which you examined to get a clear idea of how Willamette-Hyster's stops and brake operated; is that true?

A. No. I examined the machine first.

Q. Did you also examine the drawings on pages 4 and 5? A. Yes.

Q. Of the manual? A. Yes.

Q. Looking at those drawings on pages 4 and 5 of the manual, Exhibit 32, did you also come to the

(Testimony of Carl F. Gerlinger.)

conclusion that the structure shown thereon infringed claim 4 of your patent? A. Yes.

Q. Is it your understanding of the operation of the mechanism shown on pages 4 and 5 of the manual, Exhibit 32, that that mechanism will stop the movement of the load lifting means in either direction automatically, irrespective of whether there is any load in the machine?

The Witness: Will you repeat that again, please.

(Last question read.)

A. Yes.

Q. The mechanism shown in the drawings on pages 4 and 5 of Plaintiff's Exhibit 32 has no part in it which must be engaged by the load and pushed upwardly in order to push the clutch into neutral, has it?

The Witness: Let me get that, please.

(Last question read.)

A. It would have the same action.

Mr. Fryer: I know that may be your opinion, but I want you to answer the question, and I will ask to have it read to you again and see if you can answer it "yes" or "no" and then make any explanation you wish.

(Last question read.)

A. I would say yes.

Q. Will you point out that part, please, in the drawings on [416] pages 4 and 5 of Exhibit 32.

A. If you have a load and you raise a small load it will hit that LS with EB and stop it.

(Testimony of Carl F. Gerlinger.)

Q. You haven't answered my question, which was this: Point out in the drawings on pages 4 and 5 of Exhibit 32 the part which is struck by the load and pushed upwardly in order to throw the clutch into neutral. A. No, that don't.

Q. There is no such part? A. No.

Q. In the drawings on pages 4 and 5?

A. No.

Q. In Exhibit 32? A. No.

Q. Is there? A. No.

Q. Now what are the parts in the machine shown on pages 4 and 5 of Exhibit 32 which lead you to the conclusion that that mechanism contains the combination of your claim 4?

A. The clutch, automatic brake, and automatic stops.

Q. So that you have in these drawings, then, according to your opinion, on pages 4 and 5 of Exhibit 32, everything that you need to find in a construction in order to find the invention of your patent; is that your idea?

A. My own idea is that there is same function in this construction than it is in claim 4.

Q. And you come to that conclusion by inspecting the parts which you see in pages 4 and 5 of Exhibit 32?

A. Yes; and by inspecting the machine.

Q. Well, are there any parts which you consider a part of your invention which you don't find on pages 4 and 5 of Exhibit 32? A. No.

(Testimony of Carl F. Gerlinger.)

Q. They are all there, in other words?

A. Well, no—yes, that is right. [417]

Q. Your answer is “That is right”?

A. That is right.

Q. Any mechanism in your opinion or any lumber carrier which contains the parts shown on pages 4 and 5 of Exhibit 32, contains the invention of your patent; is that it?

The Witness: Pages 4 and 5 of 32?

The Master: That is the one you have in your hand.

The Witness: Oh. I *want* say yes.

Q. (By Mr. Fryer) I show you a drawing of a friction hoisting clutch and drawings of a control mechanism having upper and lower limit stops and ask you to state whether you are able to find the invention of your patent in the mechanism shown on those drawings.

A. I find the reversible clutch with brake, but I fail to find all the limit stop. If all the elements are here and would go on a carrier I say infringed, but I can't see all the—I can't find them. If they are pointed out to me more——

Q. (By Mr. Fryer) I will see if I can help you on that, Mr. Gerlinger, by calling your attention to the parts numbered 10451, 10452, 10451 and 10450 and connected linkage on the document before you, and ask you to state if that facilitates you in any way in answering the question?

A. There is one——

(Testimony of Carl F. Gerlinger.)

The Master: If you are going to speak, Mr. Gerlinger, speak out loud enough so the reporter can get it. I am just trying to see what counsel is referring to.

Mr. Fryer: I beg your pardon, Your Honor, did I indicate to you the parts I was referring to?

The Master: Yes, I have got the parts.

A. If that goes on a lumber carrier, I say yes.

Mr. Fryer: I will now ask to have marked for identification the two documents referred to by the witness as defendants' ex- [418] hibits next in order for identification. They will be 39 and 40.

The Master: 39 and 40.

(The drawings referred to were thereupon marked for identification Respondents' Exhibits 39 and 40.)

Q. (By Mr. Fryer) It is your understanding, I suppose, that the invention of your patent can be found in mechanisms which are not made in exactly the same form as that shown in the drawings of your patent in suit, is that true?

A. But the principles are there.

Q. (By Mr. Fryer) In other words, is it your understanding that the invention of your patent in suit can be found in mechanisms which differ in form from the mechanisms shown in your patent?

A. In mechanical form, yes.

A. (By Mr. Fryer) You are aware that prior to the commencement of this suit Willamette-Hyster Company, one of the defendants, was manufactur-

(Testimony of Carl F. Gerlinger.)

ing a small lumber carrier with the load-lifting device mounted across the front end of the truck, are you? A. Yes.

Q. That truck of the defendant Willamette-Hyster Company has means to move the clutch to neutral position whenever the load-lifting device travels a predetermined extent in either direction, is that your understanding?

A. I didn't examine the truck.

Q. But is it your understanding that that lift truck of the defendant Willamette-Hyster has automatic means for moving the clutch to neutral position when the load lifting means reaches a predetermined upper or lower point?

A. No, I couldn't even tell you that.

Q. Is it your understanding that that truck of the Willamette- [419] Hyster Company with the load lifting device across one end of the machine has an automatic brake applied when the clutch is placed into neutral?

A. I don't know. Are you waiting on me?

Q. (By Mr. Fryer) The small truck of the defendant Willamette-Hyster with the load lifting device across the front end which you stated you understand the defendant Willamette-Hyster has been marketing is the one shown on the circular which I have just handed to you; is that right?

A. That is right.

Q. You have seen that truck around in different places, have you? A. I saw one.

(Testimony of Carl F. Gerlinger.)

Q. I call your attention to the inner page of that circular where, under the heading "Exclusive Hyster Features," the circular states, "Automatic stops for all operating controls. Hyster lift truck is foolproof." Is it your understanding that this truck of the Willamette-Hyster Company contains automatic limit stops which push the clutch into neutral whenever the load lifting device reaches its upper or lower limits?

A. I don't see where it explains in this folder where it is.

The Master: That is not the question. The question is whether or not that particular structure does include it, whether you understand it includes it.

A. I don't understand that include it.

Mr. Fryer: I now ask to have marked for identification the circular referred to by the witness in his last answer, as Defendants' Exhibit 41 for identification.

The Master: It will be so marked.

(The circular was thereupon marked for identification Respondents' Exhibit 41.)

Q. (By Mr. Fryer) Do you recognize the truck shown on the photo- [420] graph which is now shown to you as a representation of the Willamette-Hyster truck which you have referred to in your testimony having a lifting device across the front end?

(Testimony of Carl F. Gerlinger.)

A. Yes, I recognize it, but not this particular design.

Mr. Fryer: I now ask to have marked for identification as Defendants' Exhibit 42 the photograph last shown to the witness and I will hand your Honor a copy of that photograph.

The Master: It will be marked 42 for identification, Respondents'.

(The photograph was thereupon marked for identification Respondents' Exhibit 42.)

The Witness: I saw that one.

Mr. Fryer: Yes. Just a minute. I am waiting for Mr. Geisler.

Mr. Geisler: What date do you claim for that, Mr. Fryer?

Mr. Fryer: We prefer not to give that to you at this time, Mr. Geisler.

Q. I now show you another photograph and ask you to state whether you recognize that as the same truck of the defendant Willamette-Hyster Company but with one wheel removed, showing the operating mechanism more clearly. And I hand your Honor a copy of the photograph last handed to the witness for your Honor's use. A. Yes.

Mr. Fryer: I ask to have marked for identification the photograph last referred to by the witness as Defendants' Exhibit 43.

The Master: It will be so marked.

(The photograph was thereupon marked for identification Respondents' Exhibit 43.)

(Testimony of Carl F. Gerlinger.)

Q. (By Mr. Fryer) Now if the witness may be shown Exhibits 42 and 43 for identification, if the Court please, as soon as the Court is through with them. Looking at the photograph Defendants' Exhibit 43 for identification, do you recognize the yellow colored mechanism at the end of the truck opposite from the hoisting device as the defendant Willamette-Hyster's reversing friction clutch and brake, the brake being colored orange? [421]

The Master: Is that at the forward end of the hoist or the after end?

Mr. Fryer: The end of the truck at the opposite end; that is at the left hand side of the photograph.

The Master: Yes.

A. I see the color all right, but I don't see the brake very plainly.

Q. (By Mr. Fryer) Perhaps I may help you by pointing specifically to the part which I refer to and will ask you to state whether you recognize the yellow colored mechanism. A. Yes.

Q. At the end of the truck opposite from the hoist as defendant Willamette-Hyster's reversing hoisting clutch? A. Yes.

Q. And the orange colored mechanism at that same point—— A. The brake.

Q. As the automatic brake?

A. That is right, yes.

Q. Now will you state whether you recognize the red colored mechanism at the hoist end of the

(Testimony of Carl F. Gerlinger.)

truck on the photograph Defendants' Exhibit 43 for identification as automatic means to operate that yellow colored reversing clutch.

A. It is not clear to me.

Q. Assuming that the red colored mechanism at the hoist end of the truck on Defendants' Exhibit 43 for identification operates to push the yellow colored clutch into neutral whenever the load lifting means reaches an upper or lower limit of travel——

A. Yes.

Q. ——would you say that this truck mechanism on Exhibit 43 for identification contains the invention of your patent? [422]

A. I would answer this question: If it goes on a lumber carrier, I say yes.

Q. To further assist you in your answer, then will you refer to the photograph, Defendants' Exhibit 42 for identification, where that same truck is shown carrying a load of lumber, and ask you to state whether or not when so used the mechanism in that truck would contain the invention of your patent in suit?

Mr. Geisler: I would like a moment to examine those exhibits, because they raise a question.

(Consultation outside of the record between Mr. Fryer, Mr. Geisler and Mr. Dimick.)

Mr. Dimick: If the Court please, I am informed by counsel that these two photographs colored there are the same as the circular which was submitted;

I don't know the number of it; it has that red band, your Honor.

The Master: It is 41 for identification.

Mr. Geisler: 41, yes. Now it appears from those drawings that they are not lumber trucks in the sense that the invention had anything to do with it. For that reason we concede now they are not an infringement.

Mr. Fryer: The matter which I would like to know from the plaintiff, so that the rights of the defendant will be protected is whether or not the mechanism contained in Exhibits 42 and 43 for identification as explained to plaintiff is admitted by plaintiff not to come within claim 4 in the suit in so far as the mechanism for raising and lowering the load lifting means is concerned, the mechanism for automatically moving the clutch to neutral position upon the load lifting device reaching a predetermined upper and lower limit, the mechanism for automatically applying the brake when the clutch is pressed into neutral, and the manual means for operating that clutch. Now, if the plaintiff's position is that that combination of parts in this truck does not infringe claim [423] 4, then it will enable me to forego the proposed examination. If not, it will not serve any purpose.

Mr. Geisler: We are dealing here, your Honor, with an improvement of a lumber carrier in the specific sense of picking up the lumber and raising

and lowering it and moving it along. Now that is a different thing from a carrier of the type of a truck, purely and simply a truck. I think a mere inspection of the two devices differentiates them. I don't think that we should be compelled to make any further statement about it, and counsel said he offered these exhibits on the question of whether or not they infringed. Our answer is an admission they do not infringe.

Mr. Fryer: Is your statement then that there is no mechanism whatsoever in the truck shown on Defendants' Exhibits 42 and 43 which infringes claim 4 in suit in any respect whatsoever? Is that your position?

Mr. Geisler: It does not involve the combination which is included in claim 4.

Mr. Fryer: Well, is it a fact, then, that that truck shown on Exhibits 42 and 43 does not infringe claim 4 of the patent in suit in any respect whatever?

Mr. Geisler: If it does not infringe it in one respect it doesn't in any respect. That is all there is to it.

Mr. Fryer: Very well. Then we are satisfied. May I have the last question read, please, your Honor?

Mr. Geisler: Now I don't know whether there is any tail to that question. You don't mean to ask me whether the specific elements of those things are not shown in that invention—in that truck, of

(Testimony of Carl F. Gerlinger.)

claim 4? You are taking claim 4 in its entirety as a combination? That is the question to which you directed yourself?

Mr. Fryer: I refer to claim 4 that you are suing on.

Mr. Geisler: The combination involved?

Mr. Fryer: Yes, because the claim can only be a combination; nothing else. [424]

Mr. Geisler: Well, that is my position.

Mr. Fryer: Very well. Your Honor, in view of the specific admissions of plaintiff we withdraw that question and discontinue further examination on that line.

Q. At various times in your previous testimony you have said that the parts 76 and 74 of the drawings of your patent in suit did part of the work of pushing the clutch into neutral in your patent and at other times in your testimony you have said that no one of those two parts did any part of the work of pushing the clutch into neutral in the operation of the mechanism of your patent, and that matter was left with you during an adjournment for you to make a further study of your patent in suit. During one of the adjournments have you made a further study of your patent drawings? [425]

A. I made some study.

Q. How long a study did you devote to your patent?

(Testimony of Carl F. Gerlinger.)

A. Oh, about maybe fifteen or twenty minutes. I couldn't simply——

Q. As I recall your testimony, at the time of the adjournment, when you were to make further study of your patent, you said it would take about an hour for you to be able to study it sufficiently to answer these questions definitely. Did you find it unnecessary to devote that time to the study of your patent?

A. No. If you want to know the facts about that, I got sick; a spell came on me and I couldn't further study, give it any more study; but I study it about fifteen minutes.

Q. Did you have any assistance in making that study? A. No.

Q. In view of your illness?

A. No, none whatever.

Q. Did you consult Mr. Geisler in any way about that further study of your patent? A. No.

Q. And Mr. Geisler said nothing to you whatsoever about that portion of your patent during the adjournment? A. No.

Q. And you asked him nothing about it?

A. No.

Q. I just suppose that during that adjournment you didn't consult anyone else whatsoever concerning the operation of those parts of your patent during any adjournment; is that true?

A. I maybe did, but I don't remember.

Q. You don't remember who, if anyone, you talked to concerning that operation of your patent?

A. No.

(Testimony of Carl F. Gerlinger.)

Q. During the adjournment? A. No.

Q. Have you made up your mind now as to just how the parts 76 and [426] 74 in the drawings of your patent work in so far as the performance of any work in pushing the clutch to neutral is concerned?

A. 74—can I have the patent, please?

Mr. Fryer: May Exhibit No. 2 be handed to the witness, please.

A. 74 and 75 and 76 and 77, that have only for the brake operation.

The Master: For some reason or other I can't locate 75 for the time being.

Mr. Fryer: Looking at Figure 4, if your Honor please, 75 will appear as a little triangular-shaped cam on the upper surface of that horizontal bar.

The Master: Oh, yes. I get it. Now what was the answer?

A. 74, 75 and 76 and 77 exclusively is for the brake, I mean is for the brake.

Mr. Fryer: That is all.

H. N. DIMICK

resumed the stand for cross examination and, having been previously sworn, was examined and further testified as follows:

Cross Examination

By Mr. Fryer:

Mr. Fryer: May I see Plaintiff's Exhibit 11, if your Honor please? It is the drawing, yellow drawing. Will you show this to the witness, please, Mr. Bailiff.

Q. You are familiar, I assume, with the drawing shown on the Plaintiff's Exhibit 11 before you?

A. Yes, I have seen this drawing before.

Q. You understand that it represents a drawing of the machine of the Gerlinger patent here in suit?

A. I do.

Q. I call your attention to the part immediately overlying the top of the frame of the machine extending from the front end of the machine back toward the vicinity of the steering post and ask you to state what that member is. And I shall point it out [427] to you to show you what I mean.

A. I know what that member is; yes, sir.

Q. Will you state what it is, please.

A. Well, it is a connection between the steering post and the front fork or link in the steering gear.

Mr. Geisler: Pardon me, has that a number?

Mr. Fryer: There is no number on that drawing.

The Witness: There is no number here.

Q. It has rack teeth at each end for engagement with a pinion gear at the steering wheel end and

(Testimony of H. N. Dimick.)

with a segment gear at the front end of the machine; is that right?

A. I see the rack teeth and what is apparently here on the drawing a segment at the front end, but I don't see any rack teeth or pinion gear represented in this particular drawing at the rear end of the bar at the center of the machine.

Q. Is it your understanding that that member of the steering mechanism is supposed to have teeth at each end?

A. Well, speaking from memory only, I would say that that was the construction of this machine.

Q. The teeth on that bar at its end adjoining the steering post of the steering wheel would have to be long enough in their extent along the bar to provide the necessary length of forward and backward movement of that bar to properly operate the steering knuckle of the front wheel; is that right?

A. They would have to be, yes, in order to function properly.

Q. In the view which you have in your hands the end of that bar toward or adjacent the foot of the post of the steering wheel extends toward the rear of the machine a short distance beyond the ratchet for the brake pedal shown at that point; is that right?

A. Yes, I would take that to be the bar.

Q. In other words, the end of the bar extends toward the rear of the machine to a point about

(Testimony of H. N. Dimick.)

midway the center line of the steer- [428] ing post of the steering wheel and the rear edge of the steering wheel; is that right?

A. Well, I am stating this only presumably, because this bar shows a direct brake right at this point, and on this particular drawing there are no dotted lines or anything to show that as being a continuation of the bar, but in view of a part of your question and wanting to give the best answer possible, I would say that I would presume that that was intended to be an extension of that bar.

Q. From your experience as a mechanic and assuming that that bar has rack teeth on it to engage with a pinion at the base of the steering post, would you say that that bar would have to be about as long as is shown in this drawing in order to have sufficient teeth on it to turn the front wheels sufficiently to steer the vehicle?

A. I would say that, yes.

Q. So that you would say it is a reasonable assumption to assume that the end of that bar as it appears in Exhibit 11 is the mechanism which we see toward the rear of the machine behind the brake ratchet and extending to a point about midway between the center line of the post of the steering wheel and the rear edge of the steering wheel; is that right?

A. I would say that is a reasonable presumption.

Q. Now can you point out that bar which you have been describing on Plaintiff's Exhibit 11 and

(Testimony of H. N. Dimick.)

Defendants' Exhibit 25 for identification, in Figure 2 appearing thereon?

A. I would say that that bar is according to what is designated by the figure 21 on this Exhibit 25, I believe the figure is.

Q. And the teeth 22 on that bar 21 are the teeth which engage with the gear segment 23 in Figure 2; is that your understanding?

A. That is my understanding.

Q. And the teeth at the steering wheel end of bar 21 are designated by the reference character 20? [429]

A. Well, it has that appearance on the drawing. I imagine the indicator does point to the teeth on the rack bar.

Q. Now looking at Figure 1 of the Gerlinger drawing on Defendants' Exhibit 25 for identification, do you also see that bar 21?

A. I do.

Q. Do you also see in that bar a rectangular extension in parallelism with the bar 21 extending to the rear of the brake ratchet such as we saw on the drawing Exhibit 11?

A. I see an extending member there. I wouldn't say it is in parallelism. It is an extending member and it seems to be in alignment with the bar 21.

Q. You are referring now to the rectangular structure which I shall indicate on Defendants' Exhibit 25 by the reference character X?

(Testimony of H. N. Dimick.)

A. Yes, I am referring to that.

Q. (By Mr. Fryer) Now, is it your testimony that the portion marked X on Defendants' Exhibit 25 is not a continuation of the bar 21?

A. I say, apparently, according to the drawing, in my judgment, that would be a continuation of the bar 21.

Q. On Plaintiff's Exhibit 26 I notice certain colors applied to the parts, including red as one of the colors, and that on that exhibit the part which you have identified as X on Defendants' Exhibit 25 and have stated is a continuation of the bar 21 is colored red, while the rest of the bar 21 is not colored red. Does that have any significance in this exhibit, as far as you know, as to whether or not the red member marked X on Exhibit 25 is a part of the bar 21?

A. Well, due to the extraordinary atrocities of patent drawings in general, and in view of the fact that I mentioned when looking at this other drawing and seeing that there was no dotted line there to connect those two, and not having, as I remember, absolutely committed myself that that was an extension of the [430] bar 21, I might say that there could be a possible error due to the fact that there are no connecting dotted lines, or anything of that sort, to connect the two, but I do say now that that member in this particular drawing is colored red, the same as the smaller member extending rearward on the carrier.

(Testimony of H. N. Dimick.)

Q. What is your testimony now with respect to Defendants' Exhibit 25 for identification as to the part marked X? Is it your testimony that that part marked X is the rearward extension of the bar 21, or that it is not the rearward extension of the bar 21, in the machine of the Gerlinger patent?

A. Well, in my judgment, and due to the possible errors in the drawing, I would say that according to these views as they are here, particularly this one view which seems to be a view showing pretty generally the members through from the side elevation of the machine, according to this drawing as it appears here that could be a part of either of those members.

Q. And when you refer to "this drawing here" do you mean the chart, number 25?

A. Number 25. Just taking the drawing, and forgetting the colors, and so on, and reading it as a drawing by the white lines, I would say that in this view here that particular bar here, according to this view here, could be either a part of this member here or a part of that member (indicating).

The Master: When you say could be this or that, that doesn't mean anything in the record.

A. Well, this bar here is designated by two parallel lines here, black lines.

Mr. Fryer: I will clear that up in a minute. Now, if you will just take your seat, Mr. Dimick, and listen to this question and see if you can answer

(Testimony of H. N. Dimick.)

it correctly. Referring to the Gerlinger drawings shown on Defendants' Exhibit 25 for identification, will you state whether the part marked X on that drawing, in your opinion and according to your understanding of [431] the Gerlinger patent, is a part of the bar 21 or is not a part of the bar 21?

A. Well, I would consider it, taking all the views into consideration and taking the drawing as it is primarily executed, as a part of the bar 21.

Q. In some of the drawings which you have referred to in your previous testimony, presented by the plaintiff, some of the parts have been shown in different colors. Do you know what those various colors on those charts are intended to represent?

A. Well, if I were to refer to the drawings that are colored I could then, I think, say what the colors are to represent, but——

Q. Did you have anything to do with the placing of those colors on those parts of the plaintiff?

A. Well, I might say personally none whatever. I have an assistant in the drafting room, a young chap, whom I loaned to Mr. Waters and he went in another room adjoining the drafting room and did the coloring, but not under my supervision.

Q. Is it your understanding that there is any scheme or purpose in those colors by which the difference in colors shall signify certain things on the charts?

A. Well, my understanding of the colors—when they were applied to the drawings I didn't pay any

(Testimony of H. N. Dimick.)

particular attention—but my understanding was this that they were to assist anyone who might be reading the drawings in following the general outlay of the mechanism as shown on the drawings.

Q. Were parts colored the same intended to represent integral parts, or were different parts given the same color indiscriminately on the charts?

A. Well, I wouldn't say they were indiscriminately given the same color, different parts, but, as I stated before, my understanding is that they were to represent the various links in the mechanism, I might say.

Q. You would not say, for instance, that on the plaintiff's [432] chart, Exhibit 26, that all the parts which are colored red are part of one and the same piece in the machine, would you?

A. I would say that the putting the red coloring on there, it was intended that it should represent, well, not exactly the same parts, but one part pertaining to another. A better illustration is over there. I could explain it there, that the red——

A. I am referring to No. 2.

Q. (By Mr. Fryer): Are you referring to Exhibit 27?

A. Yes, Exhibit 27. Now, my understanding of those colors was this, that they were placed on there, the color or red, in some conversation I heard at the office in Dallas, was that meant to designate parts operated by hand on the mechanism.

(Testimony of H. N. Dimick.)

Q. Any hand-operated parts on the machine were to be colored red, was that it?

A. Yes, I believe that was the conversation I overheard.

Q. Well, then, the red on Exhibit 26 applied to the rear extension of the bar 21 was not intended to indicate that that red extension was part of the lever 70, for instance, was it?

A. By whoever put the colors on there that may have been deciphered as a part of the connecting links of lever 70—it might have been read as a part, I should say.

Q. According to your present understanding, the rear extension of the bar 21, which is colored red on the chart, Exhibit 25, however—26, I should say—is merely the rear extension of the bar 21 and is no part of the clutch-operating mechanism; is that your understanding?

A. Well, my understanding there is—if I could clear this thing up——

Q. Go right ahead.

A. —that there has been an error in the coloring of that drawing.

Q. And what was that error? [433]

A. In my judgment I would say that whoever colored the drawing should not have colored the rear end of this particular part right here in red (indicating).

Q. When you say “this particular part right here” you refer to the rear end of the bar 21?

(Testimony of H. N. Dimick.)

A. This extension (indicating). Yes.

Q. In your previous testimony, referring to the machine of the Gerlinger patent, you stated that when the automatic brake is applied the bar 76 applies the brake to a pulley wheel on the end of the shaft 46. Will you refer to Plaintiff's Exhibit 2 and point out that pulley wheel which you there refer to, and I will ask that the witness be handed the patent, Plaintiff's Exhibit 2.

A. May I ask if in my statement regarding the applying the brake if the pulley wheel was the only member that I mentioned? You have a copy of it there.

Q. Just a moment; I will quote your testimony to you. You were asked what would happen—pardon me—you were asked, “What would be the effect of such movement? What would it do?”, referring to parts I have mentioned of the Gerlinger patent, and you said, “Well, I am just getting to that. I am just trying to find the proper numbers—where they are located on these drawings. There is a brake arm 76 which on its under side is also supplied with a cam. Now, I don't find a cam shown on this patent drawing, but regardless of whether there is a cam there or not if this lever 75 was in a position where it didn't engage the bottom of lever 76, or it was disengaged with the higher points of the cam on that lever, the action when this lever 70 and 48, and connecting with the bar 74 carrying the cam 75, would move in that direction, these cams

(Testimony of H. N. Dimick.)

would contact at their higher point and raise the bar 76 and apply a brake to the shaft—a continuation of the shaft 46, which extends clear through to the outside—would apply a brake to a pulley wheel on the end, or [434] a brake mechanism on the end of the shaft 46, on its outer end.” Now, my question is, where is that pulley wheel which you there refer to in the Gerlinger patent?

A. Well, you are referring to Figure 4. That being the only view, I do not actually find the pulley wheel there, but in describing the patent yesterday as best I could I mentioned both that the brake would be applied to the shaft or to a pulley wheel, and in going through the different drawings, and not being accustomed to testimony of this kind, and, furthermore, not having previous to, say, perhaps two minutes to the time I was called on the witness stand reviewed this patent, and perhaps not looking at this particular patent drawing in detail for a period of three to four months before the trial came, there is a possibility I may be in error, and in reading this particular drawing, but I think that I mentioned in my testimony—I had it in mind at all times since this question was put to me today—that I mentioned that applying a brake to the shaft or a pulley wheel, and at that time I was trying to get my evidence in sequence, and I did not examine the drawings to see whether or not there actually was a pulley wheel on the end of that

(Testimony of H. N. Dimick.)

shaft, but in the real Gerlinger lift, the one that I was acquainted with on the actual machine, there had always been a pulley wheel there, so I took it for granted it should be in the drawings. At least, it should be.

Q. That is, in your explanation of the patent in suit here you rely to some extent upon your familiarity with, and knowledge of, a commercial machine built by the Dallas Machine & Locomotive Works, is that right?

A. Yes, in my description I was bearing in mind at all times the actual mechanism to assist me in following this drawing more readily.

Q. And in that actual mechanism there was contained a pulley wheel, is that right?

A. In all cases I remember, yes. [435]

Q. And your testimony now is that that pulley wheel is not shown in the drawings of the Gerlinger patent?

A. I don't find it in this drawing today. I am not able to find the pulley wheel.

Q. Throughout your description and explanation of the machine of the Gerlinger patent as shown in drawings and description of Exhibit 2 you relied upon the recollection of Gerlinger carriers as you found them operating in the field, did you?

A. I relied on my remembering of the mechanism to sort of guide me through the various drawings, of which there were three up here, with the

(Testimony of H. N. Dimick.)

numbers promiscuously over the three drawings, to just aid me in following the mechanism.

Q. I believe you have stated that in the latter part or the early part of the year 1922 you saw a lumber carrier which was built substantially as shown by the patent, Plaintiff's Exhibit 2. Did that machine there referred to by you contain parts substantially identical in construction and operation with the parts 90 and 91 on Plaintiff's Exhibit 6 before you?

The Master: He is referring to Exhibit 6, Mr. Dimick. That is the chart on the board.

Mr. Fryer: That is the chart.

A. You mentioned Exhibit 2, also, in your question.

Q. Yes, sir.

A. Yes, I saw a carrier that was built substantially as this Exhibit 2, and that carrier built substantially, as I said as Exhibit 2, did not when I first observed it have the parts 90 and 91, in my memory, and I might add that looking at the parts 90 and 91 do not recall to my memory anything that I saw in this particular number 1 machine, the number 1 plaintiff's machine. I do not recall to memory any parts of that kind in the plaintiff's number 1 machine.

Q. That plaintiff's number 1 machine had only a part like the part 67 on Exhibit 6, which when pushed upwardly by the load in the machine pushed the clutch to neutral, is that your recol- [436] lection of it?

(Testimony of H. N. Dimick.)

A. My recollection is that that particular number 1 machine, what has been referred to as the number 1 machine here in the Court, had only the upper stop 67—that is, as an upper stop.

Q. Now, you stated, I believe, that just before you left for Australia, and after seeing the last Gerlinger hydraulic carrier which you saw manufactured by the plaintiff, you saw in construction at the plaintiff's plant a Gerlinger RPF carrier of the rack and pinion type. Will you state whether or not that RPF Gerlinger carrier which you saw in construction at the plaintiff's plant just before you left for Australia contained parts substantially identical in construction and operation with the parts 90 and 91 of Exhibit 6?

A. That question reads that the machine that I saw——

Q. I will withdraw the question and put it this way——

A. Well, I—okeh.

Q. —I believe in your previous testimony you referred to a Gerlinger RPF carrier which you saw in course of construction at the plaintiff's plant shortly before you left for Australia. Will you state whether or not that RPF carrier which you saw at that time contained a member like the bar 67 shown on Exhibit 6 which operated upon upward movement of the load to push the clutch into neutral position?

A. At the time I left for Australia the RPF carrier which was under construction at the Dallas

(Testimony of H. N. Dimick.)

Machine & Locomotive Works had not progressed far enough to require parts of that kind.

Q. That was a rack and pinion type carrier, that RPF carrier you refer to?

A. The plans were to make an RPF carrier, rack and pinion type carrier, but the racks had not been supplied yet when I left for Australia.

Q. After that occasion when you were about to leave for Australia did you ever see any so-called RPF carriers made by the plaintiff? [437]

The Master: The witness now answers "Yes".

Q. (By Mr. Fryer): Did any of those RPF Gerlinger carriers which you saw contain a part like the part 67 of Plaintiff's Exhibit 2—

A. They did not—oh, I beg your pardon.

Q. —which pushed the clutch into neutral when engaged by the load in the machine?

A. They did not.

Q. In your description of plaintiff's patent in suit, Exhibit 2, you have stated, I believe, that you failed to find in the patent numbers to indicate a stop described in the patent as means for disengaging the clutch or throwing the clutch in neutral position and applying the brake when the load-lifting means had traveled a predetermined extent in either direction. Did you also fail to find in the drawings of the patent, Plaintiff's Exhibit 2, any parts to which such numbers properly could have been applied to indicate the kind of stop mechanism you there had in mind?

(Testimony of H. N. Dimick.)

A. Well, it seems to me that the question, Attorney, has placed a sort of a double question, or a statement and a question.

Q. Do you fail to understand the question, Mr. Dimick?

A. Well, it doesn't—your inference doesn't—I don't quite get it. You say that you——

Q. I will try to make it plainer for you by quoting your previous testimony, and that, perhaps, may help you.

Mr. Geisler: What page is that, please?

Mr. Fryer: Page 256. You testified as follows, referring to the patent in suit and Plaintiff's Exhibit 6, you said, "Then when I had completed the reading of the patent as far as reference numbers were concerned, and included in the patent description, I failed to find numbers to indicate a stop described in the patent as a means of stopping the lifting mechanism when the—or, in other words, it should be disengaging the clutch [438] or throwing the clutch in neutral position and applying the brake when the load-lifting means had traveled a predetermined extent in either direction." Now, with that testimony of yours in mind, will you state whether or not you likewise failed to find in the drawings of the Gerlinger patent any parts to which the numbers properly could be applied to indicate the kind of stop you there had in mind?

Mr. Geisler: May I ask, your Honor—I beg your pardon, but I think the counsel should read the full

(Testimony of H. N. Dimick.)

question and not leave out those reference numbers and not try to perplex the witness. I submit the question is not fair that way. The question is to be interpreted by reading what has been previously testified by the witness. The whole question should be put.

Mr. Fryer: I am quite willing to read as much of the record to the witness as he would like to hear, your Honor.

The Master: Are you reading a part of a question?

Mr. Fryer: Well, part of a long answer, about a page and a half, or one page, long. I would be glad to read it all, if your Honor thinks it advisable.

The Master: Well, of course, I don't know what the answer was. If counsel for the plaintiff feels that there is part of that answer or of your question that should be read to the witness so that he will understand——

Mr. Fryer: I would be glad to have counsel read any part of the record to the witness he wants.

Mr. Geisler: Well, the question as put embodies the re-reading—or at least the reading of the answer of the witness as put yesterday. I suppose there are a couple of lines. Here is what it says: “* * * Or, in other words, it should be disengaging the clutch or throwing the clutch in neutral position and applying the brake when the load-lifting means had traveled a predetermined extent in either

(Testimony of H. N. Dimick.)

direction, and my interpretation of this action was that the members 90 and 91 were members supplied to terminate the movement of the load-lifting means to [439] a predetermined extent in the upward direction." Now, by reading that much I think the witness's mind is directed explicitly to what he said yesterday.

A. Your Honor, may I place a question here to get myself straightened out?

The Master: Yes.

A. Just there in that particular wording was I testifying at that time on this Exhibit 2, or was it Exhibit 6?

Mr. Fryer: I will read you the question to which you made the statements which your counsel has quoted to you, and that may clear your mind on the matter. Plaintiff's counsel asked you, "Mr. Dimick, you may state why on that drawing, Complainant's Exhibit 6, you included the devices 90 and 91 in addition to 67?" and the statements which you have had quoted to you were in answer to that question.

A. I see. Well, that is correct. I did make those statements and explained why I added those, but I thought you were asking the question—sorry—I thought you were asking the question as regards my testimony on Exhibit 2.

Q. Now, to make it simpler for you, Mr. Dimick, I will merely put it this way: In your answer to the question I just read to you, among other

(Testimony of H. N. Dimick.)

things you said, "Then when I had completed the reading of the patent as far as reference numbers were concerned, and included in the patent description, I failed to find numbers to indicate a stop described in that patent." A. That is correct.

Q. Now, my question is, did you also fail to find parts to which any such numbers could have been applied?

A. In the reading of the patent, you mean?

Q. Yes.

A. I didn't find any parts mentioned in the patent, specific parts, that would indicate levers 90 and the part 91.

Q. May the witness be shown Plaintiff's Exhibit 37, please? Do I correctly understand that your free-hand sketch, Plaintiff's [440] Exhibit 37, was intended as an expression of your understanding of how the parts 67, 69 and 48 of the patent in suit could be constructed, or that such sketch illustrates what you understand the drawings to represent?

A. My purpose in making this sketch up—I think I more or less misunderstood—my idea in making this sketch was not with the idea of bringing this sketch into court at all, but Mr. Geisler informed me that His Honor did not understand exactly how that operation could be carried out, and I made this sketch hurriedly while I was having lunch and brought it back here with the intention of showing the Court how a cam, a certain

(Testimony of H. N. Dimick.)

type of cam, could be placed to move the lever 48.

Q. Is it your understanding that the disclosure of the Gerlinger patent in suit relating to the parts shown on your sketch Exhibit 37 is somewhat indistinct or uncertain?

A. You are referring to the patent drawings?

Q. Yes.

A. Well, they are as they are shown on the patent drawings in the three exhibits. In the places they appear in the three exhibits, why, they are rather difficult to decipher in their particular operation, I would say.

Q. Inasfar as those mere drawings alone are concerned, unaided by your recollection of how the actual Gerlinger machines which you saw in the field operated; they do not give you a very clear idea of some of the details of construction of the machine of the Gerlinger patent, is that true?

A. That is true.

Q. For instance, referring to the chart Plaintiff's Exhibit 27, do you have a clear conception of what is represented by the two parallel lines extending in an inverted U shape about the end of the lead line leading from the reference character 69?

A. The lead line 69 is according to the patent description. I believe that was mentioned as a bar with a cam-shaped upper end. [441]

Q. I would like you to state whether you yourself have any clear conception of what part of the

(Testimony of H. N. Dimick.)

mechanism is represented by that U-shaped structure indicated by the two parallel lines forming an inverted U at about the end of the lead line coming down from the figure 69?

A. That I would say, those parallel lines represent the cam mentioned.

Q. That would all be part of the cam 69, in your opinion, is that right?

A. It would in my opinion, yes, the way it is shown there.

Q. And that would be a cam something like the one shown on your sketch Plaintiff's Exhibit 37?

A. Well, it may not be the same in exact detail. For instance, there might be a flat spot, or something like that, shown there. There are two lines shown there running parallel to each other.

Q. Now, have you in your own mind any clear conception of how the part 67 is hung in the drawings of the patent Exhibit 2 inasfar as its pivotal mounting is concerned? A. Yes.

Q. How was that mounting arranged?

A. Well, there was—you say so far as the drawing is concerned?

Q. The drawing of the patent Exhibit 2.

A. Well, the drawing of the patent Exhibit 2—you refer to this drawing, is that right?

Q. Any of the drawings of the patent in suit, Exhibit 2.

A. Well, on this 27, Exhibit 27 here, there are no means of hanging that bar shown in this particular drawing that I can find.

(Testimony of H. N. Dimick.)

Q. Well, can you find any such means anywhere in the patent Exhibit 2 which gives you any idea on that subject?

A. No, I see nothing there that would indicate a hanger.

Q. Referring to the chart Plaintiff's Exhibit 27, will you state in what direction the hand lever 70 moves when the operator [442] employs it for putting the clutch in or out of operative position?

A. In what direction? In or out of operative position?

Q. Yes.

A. In going in or out of operative position it could move in either of two directions.

Q. Well, is it your understanding that the operator when he grasps the hand lever 70 to actuate the clutch rotates that lever toward the upper part of Exhibit 27, or, in another case, toward the lower part of Exhibit 27?

A. That is correct.

Q. Is it your understanding that the pivot shown for the hand lever 70 in the drawings of the Gerlinger patent is correctly placed to permit that operation?

A. I believe that any mechanic would consider that that was the case, that that pivot was properly placed.

Q. That pivot is placed for rotation of the handle 70 about an axis extending at right angles to the longitudinal axis of the machine, is that your understanding?

(Testimony of H. N. Dimick.)

A. Well, this drawing is a plan view, as I understood it, and if the lever did not go directly straight down or toward the wheel as shown there for your information, and there was an offset in it, that would show as it is shown there on the drawing. If there was any offset in that lever it would show in—well, in parallel lines running across the drawing.

Q. As far as you can see, then, the drawings of the Gerlinger patent Exhibit 2 with respect to the arrangement of the hand lever 70 are entirely clear and not one of these atrocities you referred to in your previous testimony, is that right?

A. Well, it might be an atrocity in the drawing, but I am just explaining how I would decipher it, that that never has—it has an offset in there to bring it back nearer the speed or convenient to the operator; it has an offset; it is offset toward the rear of the machine, between the coupling with the link that couples the bottom of that lever to the lever or bar [443] 48, and in making the drawing the draftsman who made these patent drawings intended that to show that the lever did extend backward toward the feet to bring it close to the operator.

Q. What I am interested in knowing, Mr. Dimick, is whether inasfar as the handle 70 of the Gerlinger patent is concerned your understanding of the construction and operation of the machine is entirely clear. A. Yes.

(Testimony of H. N. Dimick.)

Q. You had no difficulty with that part of the drawings in understanding how it works, is that right?

A. That is correct.

Q. Do you have any recollection of the so-called first Gerlinger machine which is sufficiently clear to enable you to identify a photograph of a machine having substantially the same construction as that first Gerlinger machine?

A. I think I could identify a photograph if it was substantially the same.

Q. I show you three photographs of a lumber carrier and ask you to state whether or not the construction of that lumber carrier, insofar as you can understand it from the photographs, is substantially identical with that of the so-called first Gerlinger carrier which you have testified about? I hand Your Honor copies of the photographs just handed to the witness, that you may have for your own use if you care to.

The Master: Thank you.

A. I do not find anything there that is necessary for me to identify that as substantially—What was the word you used there? Read the question again.

(The question was thereupon read.)

A. I find parts there that are an exact duplicate of the first Gerlinger carrier as I remember it, and there are a great many parts of the machine which are not shown, so I would not be able to

(Testimony of H. N. Dimick.)

identify it as substantially identical of the first Gerlinger carrier. [444]

Mr. Fryer: May I have the photographs, please? We now ask to have marked for identification as Defendants' Exhibit 44-A the rear view of the three photographs referred to by the witness.

(The photograph referred to was thereupon marked for identification Respondents' Exhibit 44-A.)

Mr. Fryer: We ask to have marked as Defendants' Exhibit 44-B for identification the side elevation photograph referred to by the witness.

(The photograph referred to was thereupon marked for identification Respondents' Exhibit 44-B.)

Mr. Fryer: And we ask to have marked 44-C for identification the rear view of the machine with a load of lumber in it.

(The photograph referred to was thereupon marked for identification Respondents' Exhibit 44-C.)

The Master: 44-A is the rear view empty, is that right?

Mr. Fryer: Yes, Your Honor.

The Master: They are so marked.

Q. (By Mr. Fryer): Now will you look at the photograph 44-B for identification and point out thereon any of the parts which you say are sub-

(Testimony of H. N. Dimick.)

stantial duplicates of the first Gerlinger machine which you have referred to?

A. In answering these questions do you want me to point out the likenesses on the drawing?

Q. (By Mr. Fryer): Not for the time being. You have mentioned that on these photographs you found some parts which were duplicates of parts in the Gerlinger No. 1 machine. Now I am merely asking you to point out which parts on the photograph constitute those duplicates, and I handed you the photograph Exhibit 44-B for that purpose.

A. Well, I find on this particular drawing I can see two of the rack bars, the right hand front and right hand rear rack bars. I find a longitudinal shaft running practically equivalent of the wheel base of the machine. [445]

Q. May I ask, if you refer to them by the colors which appear upon the photograph then we will all be able to know which they are.

A. That shaft is yellow; I guess you would call it yellow; and the rack bars I refer to are——

Q. That is intended to be purple.

A. I was going to say I wasn't an authority on that color but I thought it was purple. And I find a housing about the center of that shaft that seems to resemble very much the worm housing, the worm wheel housing that was on the No. 1 machine.

Q. That is also colored yellow?

A. That is also colored yellow. Then I find—I see an upright lever there colored——

(Testimony of H. N. Dimick.)

Q. Brown.

A. Orange, I would say. Is that correct?

Q. No; it is supposed to be brown.

A. Brown. That resembles the upper end of the lever on No. 1 machine. I remember at one time that No. 1 machine had another little projection there but it is really not mechanically very important, as I remember now. And on this rear right hand rack bar, which is colored purple, I find an angular bracket.

Q. That is marked with black cross-hatching?

A. Yes; and while not in every detail substantially identical it represents the same thing, inasmuch as some of the same details might be gone into on a patent drawing. They don't show it very plainly, but I imagine that is the equivalent of a set screw on the down stop. And also in brown here I find a braking mechanism which is——

Q. That was intended to be orange, Mr. Dimick.

A. Sorry. O. K. Orange I will say, then.

Q. It is our fault.

A. It operates on the same principle as the brake on the No. 1 machine, as I remember it. And in green I find first a couple of bearings or boxes setting on the top or on the deck frame. It seems to me to be substantially similar to the No. 1 machine. [446] And I see the ends of some crossbars and gusset plates, and they are also continued down. I can't tell just how far they go here, but they are

(Testimony of H. N. Dimick.)

much of the same design. And speaking of—well, we will go on down here. There are some lower fork bearings or boxes that serve the same purpose, that resemble those in the No. 1 machine. But insofar as the green colors are concerned, I don't see that the side view—as far as frame structure is concerned it doesn't seem to recall the No. 1 machine in the exact detail, but the members that I have mentioned are somewhat similar. And not colored, and in front particularly, just behind the rack bar and pinion I see a worm housing there; that is, speaking of in front of the machine on the right hand corner, right hand front corner. There is a worm housing there that reminds me of a worm housing on the No. 1 machine, and the sprocket in the rear of the large sprocket directly above the wheel hides any structure that might be directly behind that; and the other driving sprocket, the one forward of the big sprocket mentioned, one at least that might be larger or smaller, but primarily a driving sprocket there, is much the same as the No. 1 machine. The motor is of the same design, as near as I can see, as the No. 1 machine, as I remember it. The radiator and all seem to have about the same contour. The seat—well, it is just a seat. I don't remember exactly.

Q. How about the part shown with black lines drawn across it just below the upper member of the frame in the corner where that brace appears?

(Testimony of H. N. Dimick.)

A. Yes. I meant to mention that. Yes, that brings to memory that bar underneath the frame is the load stop.

Q. That is a bar corresponding to the bar 67 of the Gerlinger patent? A. Yes, sir.

Q. Now will you look at the rear end view of that machine shown in the photograph Exhibit 44-A for identification and point out [447] if you will, on that photograph, what parts, if any, you find substantially the same as parts which you recall in the No. 1 Gerlinger machine.

A. Is it necessary to mention parts I have mentioned before?

Q. No.

A. Well, I will mention first the back of the rack bar. I can see the teeth very dimly here. The back of the rack bar on the left hand side painted purple, that looks very much the same. And then there is a shaft, a cross shaft, yellow, which seems to be identical with the shaft on the No. 1 machine; that is, as far as the purpose is concerned; it might be larger or smaller. Then I see the operating lever with the left hand offset. That is painted brown. It serves the same purpose. It might not be exactly the same shape; it doesn't really seem to be the same shape, as I remember the No. 1 machine. Then I see a fore and after member; I believe it is meant to be yellow, isn't it?

Q. Yes.

(Testimony of H. N. Dimick.)

A. That fore and after member that pivots where the green bracket is shown here?

Q. Yes.

A. It is shown just under the shaft.

Q. It is colored yellow as well as will show on the photograph.

A. Yes. O. K. Well, that would be the equivalent of the—oh, I have forgotten the number now. I believe it is shown by 64 here extending back.

Q. When you say “here”, you mean in the drawings in the Gerlinger patent?

A. 64 on this drawing here. It comes back here in a similar manner. I am just saying that I see a member there painted yellow, and I see also some connecting links there with various nuts and so forth that are painted yellow. Then there is—well, that pivots in a bracket or bearing or something of that sort that is painted or colored green here. [448]

Q. That is lying just below the yellow shaft?

A. Yes, just below that, and it is fastened to the—it is bolted, it looks here, on top of the base of the rear worm housing. Well, to say that is substantially the same as the No. 1 machine, that would be pretty difficult, but it serves the same purpose as the similar device on the No. 1 machine. The form may have been changed. And also apparently pivoted, or fastened by a bolt which has a form of a pivot, is an angular member known to the profession as—I suppose that represents a bell crank. It has the cross lines, the black cross lines

(Testimony of H. N. Dimick.)

to make it more distinct on the photograph, and it seems to me that—when I was first observing this machine at the Willamette Valley Mill in Dallas my recollection is that that bell crank is not substantially the same as the bell crank; that is, in its position on the carrier the way it is located. I have mentioned this right hand rear rack bar with the device with the cross line at the top. And here in this drawing I also see the final drive housing, which seems to be substantially the same, and the sprocket and driving head body construction on the left hand rear of the machine in view here; it seems to be substantially the same. And I also see a view of this bar 67 underneath marked by the cross lines. I won't go any farther on the cross bar for the moment. Well, as far as the parts of the frame members themselves colored green and these lower fork boxes and the upper fork bearings, they seem to be very much the same, but on the legs of the frame I see a couple of members apparently made out of flat strap iron there. I don't recall having seen any similar pieces on the No. 1 machine, though they may have been there; I don't remember. But to get down to the shoes painted purple, or colored purple, rather, I don't remember that No. 1 machine as having that type of lifting shoe.

Q. What type of lifting shoe did it have in comparison with the ones shown in the photograph, as you recall them? [449]

(Testimony of H. N. Dimick.)

A. Well, when I was operating this machine just spasmodically to familiarize myself with it, it seemed to me that in order to pick up a load I had to be rather careful of spotting the machine so that the lifting shoes would engage the bolster. In other words, there wasn't, as I remember it, there wasn't an extension, or the long angle iron in there for the lifting shoe. And is it necessary that I go into details of forks and the common numbers?

Q. No.

A. Well, those are the substantial things that I see that seem about the same as the No. 1 machine.

Q. As far as you can tell from these photographs before you, Defendants' Exhibits 44-A and -B for identification, does this machine on the photographs have any parts like the parts 90 and 91 on Exhibit 6?

A. No, I don't see any parts here that would—well, if they were here the part 91 would be obscured, I believe, in any case, and I don't see anything here—there is nothing shows that would remind me of—I believe the number was 90, the upper bar, was it not?

Mr. Fryer: That is all.

Mr. Geisler: I don't know of any redirect I want. If something should occur I ask permission to call the witness again.

Mr. Fryer: Oh, surely, I don't object to recalling him.

Mr. Geisler: Yes, so as not to waste any time.

(Witness excused.)

WALTER E. BALLANTYNE

thereupon resumed the stand as a witness in behalf of the plaintiff and, having been previously sworn, was further examined and testified as follows:

Cross Examination

By Mr. Fryer:

Q. You have stated, I believe, that you have the records concerning 95 RPF Gerlinger carriers made and sold by the plaintiff. What do these records consist of? [450]

A. The RPF, did you state?

Q. Yes, the RPF Gerlinger carrier.

A. It shows the delivery dates on all of the carriers.

Q. Anything else?

A. The model there, the date.

Q. It shows the dates of delivery? A. Yes.

Q. Have you those records with you?

A. I have them in the court room, yes, sir.

Q. Will you produce them, please?

(Witness produces records.)

Mr. Fryer: Now, if the Court please, may we see the records produced by the witness.

The Master: Has he produced them? Have you them there now?

Mr. Fryer: I believe so.

The Witness: Yes, I have them here. I am just hunting where they first start. (Witness indicates to Mr. Fryer.)

Mr. Fryer: That is all right. I will just look at them and if I have any questions I will ask you.

(Testimony of Walter E. Ballantyne.)

May I have your Honor's indulgence for just a minute. It may save time in examination.

The Master: Surely.

Q. (By Mr. Fryer): You have called attention to one page in this book which you have produced with entries commencing with the date of March 5th, 1929, and ending with November 21st, 1930. Are those the only entries on your records concerning the 95 RPF Gerlinger carriers, or are there others than these? A. There are others.

Q. Will you point them out to me, please.

A. They start in here (indicating). Now there are other models besides the RPF in here. All models are in here.

Q. In the record which you have produced there is a brown sheet, the first entry on which is dated March 5th, 1929. Is that the date of the sale of the first Gerlinger RPF carrier?

A. That is the date of delivery. [451]

Q. No Gerlinger RPF carriers were delivered prior to that date, according to your records; is that right?

A. There were none sold and delivered prior to that date, yes.

Mr. Geisler: A little louder, would you please.

Q. (By Mr. Fryer): Can you in this record mark, in numerical order, with the numbers 1, 2, 3, and so forth, the various pages in that record book which carry the dates of delivery of all of the RPF carriers sold and delivered by the plaintiff in this suit?

(Testimony of Walter E. Ballantyne.)

A. I don't know whether I know what you mean.

Mr. Fryer: Will you read the question, please?
(Last question read.)

A. I think I can.

Q. Will you do it, please, just so that we will have the places identified in your record.

A. I am kind of mixed up here.

Q. You may take it to your seat, if you prefer, and check through it and then mark them.

(Witness marks in book as requested.)

Q. Can you state briefly how these entries have been made that appear in the record book that you have produced?

A. They have been made as the carrier was delivered. Originally I used to have a sheet in there for every carrier, with those brown indexes, but my book got too small, so some of them that were obsolete were taken out.

Q. On each one of these pages which you have marked consecutively from 1 to 9, inclusive, appear the records for the delivery of all RPF Gerlinger carriers sold by the plaintiff company?

A. There is one or more on each page, yes.

Mr. Fryer: We offer in evidence, if your Honor please, the pages of this record identified by the witness and bearing the numbers 1 to 9, consecutively and inclusively, and we agree that a photo-static copy of those pages may be substituted for the [452] original so as not to deprive the plaintiff of this original record.

(Testimony of Walter E. Ballantyne.)

Mr. Geisler: No objection.

Mr. Fryer: And we ask that those nine pages be marked Defendants' Exhibit 45.

The Master: They will be so marked and received.

(The nine sheets of record book showing delivery of RPF Gerlinger carriers sold by plaintiff were received in evidence and marked Respondents' Exhibit 45, sheets 1 to 9, inclusive, photostatic copies to be substituted.)

Q. (By Mr. Fryer): You have been present in court during all of the taking of the testimony in this case up to the time that you first took the stand?

A. I have, practically all the time. I believe I was out a couple of times.

Q. You heard Mr. Gerlinger's testimony given during that time?

A. Yes, sir.

Q. You also heard Mr. Dimick's testimony?

A. Yes, sir.

Q. And you heard each of those witnesses explain that the so-called No. 1 Gerlinger machine did not have any parts in it substantially the same as the parts 90 and 91 on Plaintiff's Exhibit 6 for stopping upward movement of the load lifting means

A. Well, I don't remember all their testimony. I would not say yes or no on that.

(Testimony of Walter E. Ballantyne.)

Q. Well, is it also your recollection that the No. 1 Gerlinger machine did not have parts 90 and 91, as shown on Exhibit 6, as testified to by Mr. Dimick and Mr. Gerlinger?

A. As I remember it, it didn't.

Q. The only machines which you recall having the parts 90 and 91, as shown in Exhibit 6, were some of the machines subsequent to No. 1 machine; is that right?

A. Yes, sir; from the second machine on. [453]

Q. So that your testimony is that the Gerlinger No. 1 machine is the only one which you recall which had only a bar like the bar 67 of the patent in suit and no parts 90 and 91 which the Dallas Machine Company ever made; is that right?

A. That is right, I believe, to the best of my recollection. [454]

Q. (By Mr. Fryer): You were working for the plaintiff in 1923? A. I was.

Q. Generally, what did all of your duties consist of at that time for that company?

A. Well, I was in charge of the office. In fact, I was in the office by myself, handled the correspondence, done the buying. After hours even worked some out in the shop.

Q. You spent some of your time in the shop and some of your time in the office at that time?

A. It was strictly an office job.

Q. Did your work in the office bring you any knowledge of the products being manufactured and sold by the plaintiff? A. It did.

(Testimony of Walter E. Ballantyne.)

Q. How did you gain that knowledge? By inspection of the products?

A. By inspection of the products, and I kept all records on it, cost records; purchased the material, most of it, for them.

Q. Did that office work also give you some knowledge of the marketing of the products, from which you obtained this knowledge? A. It did.

Q. I suppose you followed the sales of the various lumber carriers which were made by the plaintiff at that time, did you?

A. To a great extent, naturally.

Q. And was it part of your duties to keep in touch with the carrier business in order to better perform your work in connection with the sales of carriers which were conducted through your office?

A. I was not in charge of sales, but naturally I took quite an interest in it.

Q. (By Mr. Fryer): In view of that interest which you took in the sales of carriers by the plaintiff did you acquire any knowledge of any competing machines which were being sold in competition with the plaintiff's carriers? [455]

A. By name only.

Q. And how did those competing machines come to your knowledge by name only at that time?

A. Well, I had seen their advertisements in magazines. Naturally we kept track of, if we lost a sale, who got it.

(Testimony of Walter E. Ballantyne.)

Q. Did you also, in instances of that kind, make any effort to find out the factors which caused the loss of the sale in any way?

A. Personally, no.

Q. Did anyone——

The Master: You will have to speak up, Mr. Ballantyne. I can't hear.

A. Personally, no.

Q. (By Mr. Fryer): Well, as an employe of the corporation did any such knowledge come to you from others working for the corporation?

A. Sometimes, yes.

Q. Now, after the year 1923 did your duties continue year by year for the plaintiff in substantially the same capacity and extent as you have just been describing? A. They did.

Q. I believe you said in your previous testimony that you knew the defendant Clark & Wilson Lumber Company had purchased several carriers from the Willamette-Hyster Company and for that reason that someone on behalf of the corporation plaintiff went to see the defendant Clark & Wilson's Willamette-Hyster carrier. How did you acquire knowledge of Clark & Wilson's purchase of a Willamette carrier?

A. Just heard it talked over in the office.

Q. Talked over by whom?

A. Why I couldn't say now.

Q. Do you know how long after defendant Clark & Wilson acquired a Willamette-Hyster it was be-

(Testimony of Walter E. Ballantyne.)

fore this matter was talked over in the office of the plaintiff? [456] A. No.

Q. Was it a long period of years, or a short space of time?

A. I don't even know when the Clark & Wilson bought it. I am unable to answer that.

Q. As far as you know, then, the defendant Clark & Wilson might have had this Willamette carrier for a long period of time before the plaintiff acquired any knowledge of it, is that right?

A. Before I did, anyway.

Q. Now, when your company inspected the defendant Clark & Wilson's lumber carrier did it have any difficulty getting access to the carrier for that inspection?

A. I wasn't there at the inspection, but not as far as I heard.

Q. You did not hear anything in the discussions at the plaintiff's plant or office concerning any unusual methods that had to be resorted to in order to inspect the defendant Clark & Wilson's lumber carrier, did you? A. No.

Q. Now, at the time that someone on behalf of your company inspected Clark & Wilson's lumber carrier I suppose they also saw Clark & Wilson's Ross carriers around the plant at the same time, is that your understanding?

A. I had no understanding on that point.

Q. You know that defendant Clark & Wilson uses a large number of Ross carriers today, don't you?

(Testimony of Walter E. Ballantyne.)

Mr. Geisler: I object to that question. I think that is immaterial, what they do now.

Mr. Fryer: Well, I will modify the question and confine it to at the time of the bringing of the suit, then.

A. Well, at the time they reported back on that there was nothing that I remember was said of Ross carriers.

Q. When did you first learn that the defendant Clark & Wilson Lumber Company was using Ross carriers? A. I couldn't say. [457]

Q. You don't have any recollection whatsoever in your mind as to when you first acquired that knowledge, is that your testimony?

A. Yes. It was a number of years ago, though.

Q. Was it before or after you learned that defendant Clark & Wilson Company were using Willamette carriers also? Do you remember now about how long before?

A. No, because I don't know when Clark & Wilson got *there* Willamettes, so I couldn't say.

Q. Well, do you remember the length of interval between the time when you learned of these Ross carriers and the time when your company inspected Clark & Wilson's Willamette carrier?

A. That was quite a number of years. I don't know exactly.

Q. Roughly, would you say something like three or four years?

(Testimony of Walter E. Ballantyne.)

A. I would just have to guess. That would be, I suppose, as good a guess as any, if you want me to guess.

Q. From your familiarity with the carrier business in your work with the company you have known that Ross carriers have been sold in and around Portland for a good many years, is that true? A. Yes.

Q. You have seen them around the various lumber companies and other places in and around Portland for quite a long time, haven't you?

A. I never got a good look at a Ross carrier until about six months ago. I had seen them from a distance.

Q. For a considerable period of time?

A. For several years anyway.

Q. Now, in your testimony you have referred to other machines investigated by your General Superintendent and I think you [458] were referring to Willamette-Hyster machines. Will you name the first of these other Willamette-Hyster machines which were inspected by your General Superintendent or anyone on behalf of your company?

A. I couldn't name the first. I don't know which place he went first.

Q. Well, will you tell us all of the places they went to inspect machines, then we will get to the matter of time later. Will you name the various Willamette-Hyster machines which have been inspected by your company, as far as you know?

(Testimony of Walter E. Ballantyne.)

A. Inspected Clark & Wilson; and there was one at Forest Grove—I wouldn't be certain, but I think that is the Simpson Lumber Company; and there was one at Cottage Grove, and I know that he inspected one at Inman-Poulsen.

Q. When you say "he" you refer to the General Superintendent?

A. The General Superintendent, Mr. Waters.

Q. When did Mr. Waters inspect the Inman-Poulsen machine?

A. Several times, I believe. I couldn't say when, but within the last year.

Q. About what time would you say he inspected the machine at Cottage Grove?

A. Within the last year.

Q. Is that also true with respect to the machine at Forest Grove, the Simpson Lumber Company?

A. It is.

Q. Now, as to any of those different instances did you learn of any trouble or difficulty which Mr. Waters had in gaining access to these machines for inspecting them? A. He didn't tell me of any.

Q. As to each one of those machines which Mr. Waters inspected do you know how your company happened to find out that those machines were available for inspection? [459]

A. No, I couldn't say I do.

Q. Do you remember of any efforts or difficulties which the company contended with in finding out where these various machines were to be inspected?

A. No.

(Testimony of Walter E. Ballantyne.)

Q. Has your company always maintained records such as those you have produced here and which are now in evidence as Defendants' Exhibit 45 showing the dates of sale of carriers?

A. They have.

Q. Have you got the records concerning the sale of two hydraulic carriers to the Clark & Wilson Lumber Company? A. I have, I think.

Q. Will you produce that record?

A. The Court has my record book.

Q. Will you point out the part in that record book, if you please, which shows the record of sale of two hydraulic carriers to defendant Clark & Wilson?

(The witness here indicated, without comment, a place in said book.)

Q. The record which you have produced reads as follows: "one, Clark & Wilson Lumber Company, March 1st, 1923. One, Clark & Wilson Lumber Company, June 1st, 1923." Do those entries indicate that the two hydraulic Gerlinger carriers which I asked you about were delivered to Clark & Wilson Lumber Company on those dates respectively?

A. Approximately those dates, yes.

The Master: That was in June and what other month?

Mr. Fryer: March 1st, 1923, and June 1st, 1923. That is all.

The Master: Any redirect.

Mr. Geisler: Yes, your Honor.

(Testimony of Walter E. Ballantyne.)

Redirect Examination

By Mr. Geisler: [460]

Q. In your cross examination, Mr. Ballantyne, you referred to entries in your record with regard to the sales of mechanical lift lumber carriers, and specifically to RPN. Did you make any other sales—

The Master: RPF, I think.

Mr. Geisler: RPF, thank you. Did you make any additional sales recorded in your book of mechanical lift besides those?

A. I did. What—

Q. What was the general term under which you sold lumber carriers of that particular type?

A. Well, they were all mechanical lift, but they were different; we called them different models, although they were all RP, which stands for “rack and pinion”.

Q. Oh. Would you please in that regard now point out to the Court the additional entries in regard to these other sales of mechanical lift carriers.

(The witness, without comment, here indicated a place in said book.)

The Master: I shall mark these 10, 11 and 12.

Mr. Geisler: Very well, your Honor.

The Master: They are not offered in evidence, and I just simply mark them for reference. Those are the last three pages in the book.

Mr. Geisler: Very well. Those were of lumber carriers, were they? A. Yes, sir.

(Testimony of Walter E. Ballantyne.)

Mr. Geisler: We offer those additional pages of the record in evidence.

Mr. Fryer: We have no objection.

The Master: It becomes Complainant's Exhibit 46, three sheets back in the last three pages of the book marked 10, 11 and [461] 12, and I take it that photostats will be substituted in place of those?

(The three sheets referred to were thereupon received in evidence and marked Complainant's Exhibit 46, a photostatic copy thereof to be substituted for the original.)

(Witness excused.)

JOHN L. WATERS

thereupon resumed the witness stand, and was examined and testified further as follows:

Cross Examination

By Mr. Fryer:

Mr. Fryer: May I ask that the witness be handed Plaintiff's Exhibit 2, please. From your inspection of the drawings of the patent in suit, Exhibit 2, is it your understanding that the reversing clutch 47 is shown more or less diagrammatically, without the details of its interior construction? A. Yes, sir.

Q. The patent drawings as you understand them show a housing and an operating lever 48 extend-

(Testimony of John L. Waters.)

ing therefrom, that whole representation being intended merely to indicate that any suitable form of clutch or controlling mechanism shall be used at that point, is that your understanding?

A. Any kind of controls that will operate the reversible type of clutch.

Q. That is without showing the interior mechanism of this arrangement, the patentee merely prescribes that at this point in his mechanism he shall have a power-controlling device which can be set in neutral or forward or reverse position by the use of an operating member like 48, is that your understanding? A. Yes, sir.

Q. And you would say, then, that an equivalent of this arrangement 47 and 48 of the patent in suit would be any power-con- [462] trolling mechanism there which would have suitable mechanism by which the operating lever could be placed either in neutral or could transmit power in one direction or in the opposite direction, is that your understanding? A. Yes, sir.

Q. From your study of the patent in suit is it your understanding that the bar 67 functions to place the clutch in neutral only in the event that a load engages the bar 67 and pushes it up the proper distance to accomplish that purpose?

A. Yes, sir.

Q. Do you also understand that in the defendant's Willamette-Hyster machine the clutch will be placed in neutral to terminate upward movement

(Testimony of John L. Waters.)

of the load-lifting device irrespective of any load in the machine? A. Yes, sir.

Mr. Fryer: May I see Exhibits 38-A, 38-B and 38-C, please?

Q. In expressing your opinion in your previous testimony to the effect that you found the combination of the patent in suit in the accused Willamette-Hyster machine, did you use, in formulating that opinion, the drawings of the Willamette-Hyster construction, Plaintiff's Exhibits 33 and 34?—and may the witness be shown these please? The large charts, your Honor. A. Yes, I did.

Q. You relied upon your understanding of the drawings Plaintiff's Exhibits 33 and 34 as part of the factors upon which you predicated that opinion?

A. Yes.

Q. And you were able to understand the accused construction [463] by the use of those drawings Plaintiff's Exhibits 33 and 34?

A. Well, the details, the exact details, are not shown. They are not—the actual construction as they are on the carrier no doubt varies some from that, but it conveys the idea and there is no question in my mind, after examining these drawings, as to what the purpose and result of the combination involved in the drawings.

Q. In other words, you find enough in these drawings, plaintiff's Exhibits 33 and 34, to enable you to express your opinion that the mechanism

(Testimony of John L. Waters.)

shown on those drawings embodies the combination of the claim in suit, is that right?

A. That is right, yes, sir.

Q. You have everything you need for that purpose shown on these two drawings, Plaintiff's Exhibits 33 and 34?

A. Well, as I have said before, there is sufficient information on that to enable me to form an opinion as to the operating of the device.

Q. You are able to do that, I suppose, because of your experience with carrier construction and operation generally, is that true?

A. Well, naturally, being familiar with mechanical construction, it is very apparent to me the purpose and result of this combination of elements.

Q. How much experience have you had with carrier construction in general?

A. Well, I have been with the Dallas Machine & Locomotive Works for eight years, since 1928, July of 1928.

Q. Has your experience there been confined solely to carriers made by the plaintiff?

A. No, sir.

Q. You have not had anything to do with any other types of carriers have you?

A. No other carriers, no. [464]

Q. So that all that you know from a practical standpoint is solely the carrier of the plaintiff?

A. Yes, that is the only carrier that I have had any experience with.

(Testimony of John L. Waters.)

Q. The only one that you have ever seen?

A. No, sir.

Q. Have you ever seen any other carrier than those made by the plaintiff?

A. I have seen the Willamette-Hyster machine.

Q. That is the one which you have considered here to determine whether or not it was an infringement?

A. Yes, sir.

Q. Those are the only two carriers, then, that are embraced within your experience in the carrier business, is that right?

A. No, I wouldn't say that. I have seen the Ross machine, but I have never given it close examination or any more than just a casual glance, you might say.

Q. Where did you ever see a Ross carrier?

A. I have seen the Ross carrier at Inman-Poulsen. However, I have inspected one machine at Inman-Poulsen's, the Ross machine.

Q. Did you see it work?

A. No, sir.

Q. Did you inspect it closely enough to be able to recognize a photograph of it if you saw it?

A. Possibly.

Q. I will ask you to look at the photographs Defendants' Exhibits 38-A, 38-B, and 38-C and state whether or not the carrier shown in those photographs is construction which in your opinion is the same as that which you saw at Inman-Poulsen?

A. No, this construction is not the same.

Q. In what respect does it differ?

(Testimony of John L. Waters.)

A. The brake mechanism.

Q. You mean the automatic brake mechanism colored orange on [465] those photographs?

A. Yes.

Q. Explain a little more definitely how the brake mechanism colored orange on the photographs Defendants' Exhibits 38-A, -B and -C differs from that which you saw in the machine at Inman-Poulsen?

A. The machine I saw at Inman-Poulsen had no controls; didn't have any of the controls as shown on this photograph in the machine that I inspected.

Q. Did the machine at Inman-Poulsen have a brake automatically applied when the clutch went into neutral? A. No, sir.

Q. It didn't have any such brake?

A. No, sir.

Q. Was it an electric machine? A. No, sir.

Q. It was gas-powered? A. Gas-powered.

Q. Have you had sufficient experience in carrier construction and operation to formulate any opinion as to whether or not the carrier construction shown on the photographs 38-A, -B and -C contains the combination of the claim 4 in suit—and in that respect I might explain to you that the colored portions on that photograph are as follows: The purple represents load-lifting means, the brown-colored member is a manual means for operating the clutch, the brake mechanism you have already identified and the red-colored mechanism are stops con-

(Testimony of John L. Waters.)

tacted by the purple load-lifting means and throw the yellow-colored friction clutch into neutral at upper and lower predetermined limits of travel of the load-lifting means.

A. Do I understand you correctly that the yellow parts indicate the clutch mechanism?

Q. The yellow parts include the clutch and generally indicate [466] means for transmitting the power of the engine to the purple load-lifting means, and the clutch is included in that yellow structure.

A. May I have the question again, please?

Q. I may reframe it for you, to make it shorter, because the last question has been somewhat chopped up. I will ask you to state whether or not, assuming that in the photographs before you the purple structure is a load-lifting means, the yellow structure is a means for transmitting power from the motor to the load-lifting means, including a friction clutch, reversible and capable of being set in neutral, the brown mechanism represents a hand lever for operating that clutch, the red means are limit stops which automatically push the clutch to neutral when the load-lifting means reaches predetermined upper and lower limits, and the orange means is a brake mechanism automatically applied whenever the clutch is placed to neutral—with that assumption, will you state whether or not that carrier mechanism which you have before you in those exhibits would, in your opinion, contain the combination of the claim here in suit?

(Testimony of John L. Waters.)

A. Well, I don't see enough information on the three drawings to enable me to state definitely the function of each part as you have described. I would——

Q. Those photographs of an actual machine do not convey as much to your mind as the drawings Plaintiff's Exhibits 33 and 34, is that right?

A. That is right.

Q. Well, if you were to assume the construction and operation of the machine on the photographs 38-A, -B and -C to be as I have stated, would you then be still unable to express an opinion as to whether it contained the combination of the claim in suit? [467]

A. If they function as you state they would embody the claims as outlined—the elements as outlined in our claim.

Mr. Fryer: No further questions.

Redirect Examination

By Mr. Geisler:

Q. Some question has arisen as to what the part marked X on Defendants' Exhibit 25—— Now, can you tell us what that part X is?

A. My opinion is that this operation is a part of 21, the rack bar, I believe it is.

Q. Who did the coloring of these enlarged photostats of the Plaintiff's drawings, the patent drawings?

A. Mr. Fritz, working with the Dallas Machine & Locomotive Works, an assistant to Mr. Dimick.

(Testimony of John L. Waters.)

Q. Looking at Figure 1, Figure 1 of Plaintiff's drawings, patent drawings, as shown there by that Exhibit 26, Defendants' Exhibit 26——

The Master: That is the righthand one.

Mr. Geisler: The righthand side—will you kindly explain the meaning of those parts colored red extending horizontally?

A. According to our intention in coloring them, the parts colored red were to indicate the clutch control. However, there appears to be an error in the color of this section, which, in reality appears to be 21 rather than a clutch control.

The Master: Draw a line down from that portion there and mark that X so that both drawings will be the same.

(Witness does as requested.)

Q. (By Mr. Geisler): Now what is that part to the right of X, also colored red?

A. This part is the lever, clutch lever 48, I believe is the number. I would have to refer to the drawing of the other view. It is not numbered on this view.

Q. Look at that drawing before you, to the left, on that drawing there. [468]

A. Yes, 48.

Q. I call your attention to Figure 2 of Plaintiff's patent drawings and take the large photostat thereof, Plaintiff's Exhibit 27; will the bailiff kindly put it up. Some question has arisen as to what the part or construction is which looks like

(Testimony of John L. Waters.)

an inverted U over the part marked 67. Can you tell us what that construction is over 69, marked 69, referred to over the part 69?

A. Do you refer to this (witness indicating)?

A. Yes. 69 indicates the cam on the upper end of bar 67, the purpose of which is to move the lever 48 upon movement of the bar 67.

Q. Just a minute. I asked you if you could tell me the construction of that U-shaped piece or U-shaped lines which surround 69, Mr. Waters. What does that indicate?

A. The outer line indicates an opening in a deck plate permitting the cam to project up through the deck from below.

Q. I call your attention to the following paragraph of plaintiff's patent specification, being Plaintiff's Exhibit 2, reading at lines 28 to 36, inclusive, on page 2. I will read it so that we may all have it before us; "A member 67 extends across the machine in position to be engaged by the load as it rises and is pivoted at 68. It has an arm with a cam shaped upper end 69 which engages the clutch lever on its upward movement and throws it to neutral position, thereby stopping the movement of the lifting mechanism as explained above for the downward movement." Does this statement give to you a clear understanding of what the construction and cooperation of the parts referred to are?

A. Yes, sir.

(Testimony of John L. Waters.)

Q. I refer you to the sketch made by Mr Dimick. I have not the reference number of that.

The Master: 37. [469]

Q. You may state if you have examined that sketch carefully. A. Yes, sir.

Q. If you were to build a lumber carrier from the specification of Plaintiff's patent, Plaintiff's Exhibit 2, how would you make the arrangements of the parts referred to in following strictly the instruction, as I say, following strictly the instruction of the paragraph of plaintiff's patent, namely, page 2, lines 28 to 36? You may, in answering that question, refer, or not refer, to that sketch that you have in your hand.

A. I would make them substantially the same as they appear on the sketch.

Q. Plaintiff's Exhibit 37? A. On 37, yes.

Q. (By Mr. Geisler) Now with reference to that sketch, Plaintiff's Exhibit 37, will you please describe your understanding of what that sketch shows with regard to the parts and their operation as applied to plaintiff's patent drawings.

A. This sketch indicates lever 48, which is the lever controlling the clutch, the throwout of the clutch. 69 indicates the cam which is attached to crossbar 67 and as the bar 67 is raised upon contact with the load it causes cam 69 to contact member 48 and move it to the left, as shown on this drawing.

(Testimony of John L. Waters.)

Q. You have referred to the cam portion 69?

A. I beg pardon?

Q. You have referred to the cam portion 69?

A. Yes. 69 is attached to bar 67.

Q. Now in your opinion as a practical mechanic, state whether or not the interpretation which you gave of paragraph on page 2, lines 28 to 36, plaintiff's patent, is such an interpretation as you would expect any practical mechanic to make of that same paragraph.

A. Yes.

Mr. Geisler: That is all.

Mr. Fryer: No questions.

(Witness excused.) [470]

H. N. DIMICK

was thereupon recalled as a witness in behalf of the plaintiff herein and, having been previously sworn, was examined and further testified as follows:

Direct Examination

By Mr. Geisler:

Q. I will read from page 375 of the transcript of testimony, in which appear the following questions and answers, and ask you to pay attention carefully and say whether there is any correction that you wish to make in regard to your answers.
“Question: Now, have you in your own mind any

(Testimony of H. N. Dimick.)

clear conception of how the part 67 is hung in the drawings of the patent Exhibit 2 in as far as its pivotal mounting is concerned? Answer: Yes. Question: How was that mounting arranged? Answer: Well, there was—you say so far as the drawing is concerned? Question: The drawing of the patent Exhibit 2. Answer: Well, the drawing of the patent Exhibit 2—you refer to this drawing, is that right? Question: Any of the drawings of the patent in suit, Exhibit 2. Answer: Well, on this 27, Exhibit 27 here, there are no means of hanging that bar shown in this particular drawing that I can find. Question: Well, can you find any such means anywhere in the patent Exhibit 2 which gives you any idea on that subject? Answer: No, I see nothing there that would indicate a hanger.”

A. Well, in listening to the reading of the transcript I see that I made an error in deciphering just what was meant between the Exhibit, the patent, Exhibit 2, and Figure 2 in the photostatic enlargement, Exhibit 27, and in answering that I found no means for hanging the bar 67 I was referring only to this Figure 2, Exhibit 27, and instead of referring to Exhibit 2 of the patent drawings. I had the two terms mixed, Exhibit 2 and Figure 2, and I would like to make the correction to the error, that in Exhibit 2 of the patent drawings I could find, if I had the Exhibit 2 here—— [471]

(Exhibit 2 was here passed to the witness.)

(Testimony of H. N. Dimick.)

Q. Find what please? You said you could find; you didn't complete it?

A. A means of hanging or pivoting the bar 67.

Q. Proceed.

A. And looking now at Exhibit 2 and the drawing, Figure 1 in Exhibit 2, I find a means shown and indicated by the figure 68, the number 68, to indicate a means of hanging or pivoting the bar 67.

Mr. Geisler: That is all.

The Master: Any question?

Mr. Fryer: No questions.

(Witness excused.)

RONALD SHEPHERD

was thereupon produced as a witness in behalf of the plaintiff herein, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisler:

The Master: State your name and address.

The Witness: Ronald Shepherd; 2555 Northeast Forty-eighth avenue, Portland, Oregon.

The Master: You may proceed.

Q. (By Mr. Geisler) You may state what has been your training, if anything, along mechanical lines.

(Testimony of Ronald Shepherd.)

A. I served my apprenticeship with the Elderdempster Shipping Company in the drafting room and in the shops. I have worked for the U. S. Lighthouse Department in the Customs House, and with the U. S. Army Engineers, and also with the Beall Pipe & Tank Corporation as a draftsman, shop foreman, and with the Washington Tire Groover Corporation as a designer. [472]

Q. What technical training did you have?

A. Mechanical Engineering Course, later supplemented by I. C. S. correspondence work.

Q. Have you had any experience with patent matters, with regard to reading drawings and specifications of patents?

A. Yes. I have worked more than a year at patent work.

Q. For whom was that?

A. With the U. S. Army Engineers and with the firm of T. J. Geisler.

Q. Have you studied the manual here, so-called Service manual, of the defendant, which is Plaintiff's Exhibit 32 and which is shown in the drawings of defendant's Service Manual? I think that is Exhibit 32.

A. Yes, I have studied that manual.

Q. And you are familiar with it? A. Yes.

Q. State whether or not you went down to inspect an actual machine manufactured by the defendant Willamette-Hyster Company.

A. I did.

(Testimony of Ronald Shepherd.)

Mr. Fryer: Just a minute. We object to this line of examination, if your Honor please, on the ground that it is very evidently the third repetition, I believe we have had, by three different witnesses, attempting to show similarity between the patent in suit and the accused structure. Usually one expert witness is sufficient, and here this is going to make our third, as I recall the record, and I think it is an unnecessary duplication of proofs. We ask for the usual order restricting the number of experts to a side to at least two, anyway.

Mr. Geisler: We have really introduced so far, your Honor, witnesses with regard to facts only; that is, to say what the construction was of the defendant's lumber carrier, and what, if any, similarity there is thereto. [473]

The Master: I shall overrule the objection. You may proceed.

Q. You may state whether or not the machine, lumber carrier manufactured by the defendant Wilamette-Hyster Company, carried in substance the same construction as is shown there by Plaintiff's Exhibit 35.

A. Yes, it had substantially the same construction.

Q. You may state whether in the defendant's machine that you saw you found load lifting means mounted therein?

A. I did.

(Testimony of Ronald Shepherd.)

Q. Did you find means for transmitting motion from a source of power with a load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction? A. Yes, I did.

Q. Did you find any means for manually moving the clutch to operative position? A. Yes.

Q. Did you find therein automatic means for moving the clutch to [474] neutral position upon a movement of the load lifting means to a predetermined extent in either direction?

A. Yes, I did.

Q. Did you find therein means for braking the transmission means whenever the clutch is moved to neutral position? A. Yes, I did.

Q. And you may state whether the means that I have referred to which you state you saw in the defendant's lumber hoist, lumber carrier, were or were not as shown in those drawings of the defendant's manual.

A. Yes; the entire mechanism seemed to be exactly the same as shown in the two drawings.

Q. I show you here a copy of a patent and ask you to state whether or not you have seen that patent before, if you have studied it.

A. Yes, I have studied this patent.

Mr. Geisler: I offer in evidence a patent issued to G. A. Grab, Gustav A. Grab, December 29th, 1931, No. 1,838,939.

(Testimony of Ronald Shepherd.)

Mr. Fryer: We object to the offer, if the Court please, on the ground that a patent issued to a stranger to the suit would have no materiality or relevancy to the plaintiff's case. I don't know whether it is supposed to be a prior art patent, or whether it is supposed to be anything that the plaintiff is suing on. Certainly it is not the patent in suit and would have no materiality or relevancy whatsoever to the case, and we object.

The Master: What is the relevancy of it, Mr. Geisler?

Mr. Geisler: Why, it appears right on the face of it, your Honor, that this patent is held by assignment by the defendant here in suit, and it bears directly on the question of infringement, as I will be able to connect.

Mr. Fryer: The law is very clearly to the effect that no matter how many patents the defendant may have, none of them are any proof of infringement. The fact that the defendant may have a patent showing a given construction is not even circumstantial evidence that the de- [475] fendant ever made or is making anything shown in that patent, and it could have no materiality whatsoever.

Mr. Geisler: I have here the assignment from Mr. Grab to the defendant, and of course if there are any statements in that, whatever statements Mr. Grab made necessarily by adoption would bind the defendant in suit, because they are assignees and

(Testimony of Ronald Shepherd.)

they took that patent with all the notice that the record conveys.

Mr. Fryer: The patent is not an admission, if your Honor please, either by the patentee or by the grantee. There is no rule of law to that effect. And it is not evidence of infringement; it is not evidence of any manufacture on the part of the defendant. None of the reasons advanced by counsel would have any materiality, and we object to it on the ground it is not material or relevant.

Mr. Geisler: It would appear from this patent, if your Honor please, that the construction there described is substantially as shown in the manual of service issued by the defendant, and the relevancy of it will appear as the facts are developed.

The Master: Well, I shall receive it subject to that proof.

(Said Patent No. 1,838,939 issued to G. A. Grab, was thereupon received in evidence and marked Complainant's Exhibit 47.)

Mr. Geisler: We have certified copies of the assignment of that patent to the defendant.

Mr. Fryer: We don't deny that the defendant owns the patent, your Honor.

Mr. Geisler: I want to prove by that the date when the assignment was made.

Mr. Fryer: Well, we will agree to that also.

(Testimony of Ronald Shepherd.)

Mr. Geisler: You agree to the fact that the assignment was made while this patent application, which matured—— [476]

Mr. Fryer: Well, if you give me the date of the assignment I will see if I can stipulate to it.

Mr. Geisler: I will give you the date of the assignment, yes.

Mr. Fryer: Have you the assignment there, Mr. Geisler?

Mr. Geisler: We will find it in just a moment. But this particular patent was assigned to the Wilamette Iron & Steel Works, with reference to the application in this patent which matured in Patent No. 1,838,939. That assignment was made August 31st, 1927. The application was made,—that is to say, there was an original application, your Honor, which was filed July 23rd, 1927, under Serial No. 207,873, and that was afterwards substituted by the later application which matured into this Grab patent. That later application was filed May 28th, 1930. Now the assignment was made with reference to the original application and the date of the last assignment is August 31st, 1937.

The Master: 1927, you mean?

Mr. Geisler: 1927; yes, your Honor; and it conveys the full and exclusive right to said invention.

Mr. Fryer: Now if you will show me the assignment you refer to I will stipulate to that date, if you care to have such a stipulation.

(Testimony of Ronald Shepherd.)

Mr. Geisler: Just a moment. Inadvertently it seems I left those assignments on my desk.

The Master: Well, you bring them in at the two o'clock session.

Mr. Geisler: Yes, your Honor.

The Master: And the stipulation can then be entered into.

Mr. Geisler: Yes.

The Master: You may proceed then with the next matter of your examination.

Q. (By Mr. Geisler) Now have you studied that patent which I [477] have just referred to, Plaintiff's Exhibit 47, the patent being No. 1,838,939? A. Yes.

Q. Are you familiar with the description of the parts therein? A. Yes.

Q. You may state whether or not the description of the parts mentioned in this patent, Plaintiff's Exhibit 47, have or have not any similarity with the devices as shown in the drawings of defendant's Service Manual?

A. With one or two exceptions they are practically the same.

Q. Now by referring to that patent you may point out the parts of the drawings of the Service Manual which are substantially the same.

A. The mechanism is controlled manually by a hand lever which is shown on Figure 5 of the patent drawing by number 48, which seems to correspond

(Testimony of Ronald Shepherd.)

to HL on the enlarged drawing number 2 of the defendant's machine. The hand lever 48 is for the purpose of turning a shaft 47 on the patent drawings, which is indicated by IS on drawing No. 2. Moving of the hand lever in either direction oscillates a crank mounted on the end of the shaft 47 designated by number 46 in the patent drawing and the letters IL on drawing No. 2. To the end of this crank 46 is pivotally fastened a rod 45 on the patent drawing, compared to L on drawing No. 2. This rod continues back to a position adjacent the clutch and brake mechanism shown by drawing No. 1 and the rod 45 has a suitable fitting, crank-shaped, number 44, which is similar to the crank designated by the letters FSL on drawing No. 2. The crank 44 is fastened to a shaft 39 on the patent drawing, letter S on drawing No. 2 and also on No. 1. This short shaft is provided with threads at its opposite end, which are cut right and left hand. The purpose of the parts 39, 44, 45, 46 and 47 on the drawing No. 2, letters HL, IS, IL, L, FSL and S, is to [478] connect the hand lever shown by number 48 on the patent drawing with the clutch control mechanism shown by orange color on drawing No. 1. Therefore it is evident that in both cases the manual moving of the lever 48 in either direction will, by the associated mechanism, cause the clutch to be engaged in one direction or the reverse direction. Also to a fixed portion of the machine, which hasn't any

(Testimony of Ronald Shepherd.)

number or letter on either drawing, is attached a bell crank number 59 on the patent drawing, letter Z on drawing No. 2. To one end of the bell crank number 59 or letter Z is attached a rod 61 on the patent drawing, which is shown broken in Figure 5 but evidently extends down to shoes, load lifting shoes. The other end of the bell crank lever 59 is connected to a nut, number 57 on the patent drawing, no letter on the drawing No. 2 but shown. This nut is threaded so that it co-acts with a longitudinal threaded shaft number 54 on the patent drawing and shown in blue on the drawing No. 2. This shaft 54 has a sprocket wheel 53 mounted on its forward end the shaft 54 being rotated by means of a chain——

The Master: Rotated, you say?

A. Yes, rotated by means of a chain connected with the transmission gears, not shown but described in the patent. Incidentally, there are two similar mechanisms, the one just described being duplicated by the one on the opposite side of the machine. The nut 57 shown in blue on drawing No. 2 has an extending arm 57-A and letter EB on drawing No. 2, through which is passed a rod 66 in the patent drawing, letters GB on drawing No. 2. This rod No. 66 has two stops 68—three stops, rather, 68, 77, 76. The stops are so placed——

Q. (By Mr. Geisler) Do you find similar stops on drawing No. 2?

(Testimony of Ronald Shepherd.)

A. Yes, there are two of them shown on drawing No. 2 indicated by the same letters LS. The end of the rod 66 in the patent [479] drawing is attached to a pivotal lever 72 on the patent drawing. On drawing No. 2 the rod is attached directly to the crank arm IL. There is a slight difference there in mechanical construction that, while being different on result of the operation of the mechanism, is practically the same. In both cases the rod 66 is connected with a shaft 47 so that any movement of the lever 48 will cause the rod 66 to move forward and backward in a longitudinal direction for manual operation. However, rotation of the sprocket wheels 53 and the shaft, threaded shaft 54, causes the threads on the shaft 54 to co-act with the threads in the nut 57 and according to the direction of rotation thus causes the nut to travel along the thread in axial direction thus through the medium of the bell crank 59, which is indirectly attached to the nut to cause the rod 61 or the part colored in blue on the drawing No. 2 to be raised or lowered. In other words, this is the means of raising and lowering the means provided for lifting the load. At the forward end of the rod 66 is attached a stop 68, or one of the stops LS on drawing No. 2. It is evident that when the socket 53—sprocket 53 and the shaft 54 are rotated so that the nut 57 is caused to travel toward the sprocket 53, the arm 57-A, or EB, attached to the nut will contact the stop 68 or one of

(Testimony of Ronald Shepherd.)

the letters LS and cause the rod 66 to be moved longitudinally. This rod 66, or EB, previously described, being connected to the shaft 47 and hand lever 48, or IS and HL, will cause the hand lever to be pulled into the neutral position, or, in fact, pulled into any position, depending on where the stop 68 is mounted on the rod. In this particular case it is mounted on the end of the rod 66, so that when the load lifting means has reached a predetermined lower level the hand lever and associated mechanism, including the friction clutch, is brought into its neutral position. A similar stop designated by 77 on the patent drawing and the other [480] character LS on drawing No. 2, serves in like manner to limit the upward travel of the load lifting means, this entire mechanism providing an automatic stop for the load lifting means.

Q. (By Mr. Geisler) In speaking this morning, referring to drawings numbers 1 and 2, getting them into the record, you referred to what was marked Plaintiff's Exhibits 33 and 34, is that right, Mr. Shepherd? A. Yes.

Q. You may state whether the Grab patent, Plaintiff's Exhibit 47, contained automatic means for stopping the lifting mechanism when it had reached its predetermined uppermost limit, both without a load and with a load?

A. Yes, the Grab patent shows that.

(Testimony of Ronald Shepherd.)

Mr. Geisler: For convenience of looking over this one of the drawings of this Grab patent I would like to offer in evidence an enlarged photostat of Figure 5 of that patent.

Mr. Fryer: We object to it, if Your Honor please, upon the same grounds stated in our previous objection, that a patent owned by defendant is no proof whatsoever of what the defendant has made or used, and for that reason it is not material or relevant.

The Master: Upon the same conditions as regards the admission of the patent the objection will be overruled for the time being.

The Master: That will become Exhibit 48, Complainant's Exhibit 48.

(The enlarged photostat referred to was thereupon received in evidence and marked Complainant's Exhibit 48.)

Q. (By Mr. Geisler) Now, you may state what kind of specific devices the lumber carrier of the Willamette-Hyster Company which you saw had for stopping the lifting mechanism when it had reached its uppermost limit of travel? [481]

A. The Willamette carrier that I saw had precisely the same means for limiting upward travel as is shown by the Grab patent and also by drawing number 2 previously described.

Mr. Fryer: Now, unless it is understood that in the answer the word "Willamette" means Willa-

(Testimony of Ronald Shepherd.)

mette-Hyster Company, I move to strike the answer as not responsive, because "Willamette" might apply to a number of manufacturers, whereas "Willamette-Hyster" is the only one that is pertinent to this inquiry and responsive to the question.

The Master: Do you refer to Willamette-Hyster?

Mr. Geisler: The Willamette-Hyster. I thought I had said so.

The Master: Very well, that may be understood and the record will show it.

Mr. Fryer: Very well, your Honor.

Mr. Geisler: Now, I offer in evidence the assignment, certified copy here, by the patentee as assignor, Gustav A. Grab, to Willamette Iron & Steel Works of the entire right, I think it says here, something of that kind.

Mr. Fryer: We have no objection to it, if your Honor please, except its materiality upon the grounds previously urged and say that the document has no materiality whatsoever to the cause.

The Master: It will be received. At the end of the case, at the end of the testimony, I shall ask counsel to represent their objection, if they may—it may become material in the meantime—and I will pass upon it.

Mr. Geisler: I offer, your Honor, the assignment of the same patent from the Willamette Iron & Steel Works to the Willamette-Ersted Company, which was the former name of the defendant Willamette-Hyster Company.

(Testimony of Ronald Shepherd.)

Mr. Fryer: We make the same objection to that offer. [482]

The Master: It will be the same ruling, upon the same ground. The assignment to the Willamette Iron & Steel Company becomes Complainant's Exhibit 49, and the assignment from the Willamette Iron & Steel Company to the Willamette-Ersted Company becomes Complainant's Exhibit 50.

(The two assignments referred to were thereupon received in evidence and marked, respectively, Complainant's Exhibit 49 and Complainant's Exhibit 50.)

Mr. Geisler: I now offer in evidence the file wrapper and the contents of patent number 1,838,939, dated December 29, 1931, granted to Gustav A. Grab, assignor by mesne assignments to the Willamette-Ersted Company.

Mr. Fryer: The defendants make the same objection to that offer.

The Master: The same ruling. It will become Complainant's Exhibit 51, on the same conditions.

(Said file wrapper was thereupon received in evidence and marked Complainant's Exhibit 51.)

Mr. Geisler: You may take the witness.

The Master: Proceed.

(Testimony of Ronald Shepherd.)

Cross Examination

By Mr. Fryer:

Q. What is your age, Mr. Shepherd?

A. Thirty-four.

Q. Do I understand that you have been connected at some time or other with the manufacture of lumber carriers? A. No.

Q. Have you ever operated lumber carriers?

A. No.

Q. Have you ever had anything to do with them—— A. I have seen them in operation.

[483]

Q. Just a moment, please, and wait until the question is completed. May I have the question read up to the point where the witness interrupted, please?

The Reporter (Reading): “Have you ever had anything to do with them——”

Q. (By Mr. Fryer) —prior to your connection with such mechanisms for the purposes of this suit?

A. No.

Q. You say you were connected with the Army Engineering Department at sometime?

A. I was.

Q. Between what dates?

A. Between October, 1935 and May, 1936.

Q. Did that work for the Army Engineering Department occupy all of your time? A. Yes.

(Testimony of Ronald Shepherd.)

Q. After severing your connection with the Army Engineering Department in May of 1936 what did you do?

A. I was employed for a few weeks by a structural engineer in town in the design of a steel building at Marshfield.

Q. How long did that work occupy you?

A. Three or four weeks, as near as I can remember.

Q. After that what did you do?

A. Then I was employed by Mr. Geisler.

Q. That is the counsel for the plaintiff here in this cause?

A. Yes, Mr. Geisler, Jr.

Q. Whom do you mean by Mr. Geisler, Jr.?

A. Mr. L. R. Geisler, Mr. T. J. Geisler's son and his associate.

Q. Mr. Geisler, Jr., as you describe him here, is associated with Mr. T. J. Geisler, the plaintiff's counsel in this cause?

A. Yes. [484]

Q. When you were employed in that office what were your duties in the office?

A. Well, I should say to act as intermediary between the inventor and the attorney to discuss an invention with the inventor and present it in such a form and make the necessary drawings that would indicate the matter plainly to Mr. Geisler.

Q. You commenced that employ about in July or June of 1936?

A. Yes, as near as I can—

(Testimony of Ronald Shepherd.)

Q. Prior to that time had you done any work in connection with the prosecution or obtaining of patents? A. Yes.

Q. Where at?

A. With the U. S. Army Engineers.

Q. And in that Army Engineering Work what did you have to do with patents?

A. Make drawings of specific parts of the fishways construction that the Government was seeking patent on.

Q. Is that what you did for the entire time that you were employed by that Army Engineering Department?

A. No, the work was rather alternated. I would work on that part of the time and on machine design the remainder of the time.

Q. That is, for the Army Engineering Department you were making drawings to be filed in the United States Patent Office as part of applications for letters patent? A. Yes.

Q. How many applications for letters patent did you make drawings for while employed by the Army Engineering Department?

A. I can't answer that question directly, because my part of that was purely in making the drawings, and when I left the applications had not reached the point in development where they were assigned any definite numbers or quantities. The drawings were such that they applied to various

(Testimony of Ronald Shepherd.)

parts of the [485] construction, and, of course, I had nothing to do with the filing of any application.

Q. On the drawing which you referred to in your testimony in evidence as Plaintiff's Exhibit 34 did you say that you found automatic means for moving the clutch to neutral position upon movement of the load-lifting means to a predetermined extent in either direction? A. I did.

Q. Will you point those out by reference to the reference characters applied to that on Exhibit 34, please?

A. This rod extending down and broken off is understood to be connected to a load-lifting means. When this is raised or lowered, with the understanding that this shaft is rotated, the lifting and lowering of this rod is controlled by the action of the nut running backward or forward on this threaded shaft,—

Mr. Geisler: Has that a number—pardon me—that shaft?

A. There isn't a number, Mr. Geisler.

The Master: It is referred to there in pencil by the Fig. 2.

A. By 2, yes. Due the fact that there is a projection mounted on the nut and marked EB, that projection, of course, moving with the nut laterally, it is brought to bear against stops marked LS secured firmly to a rod GB, the rod GB being ulti-

(Testimony of Ronald Shepherd.)

mately connected to the lever and back to this mechanism which operates the friction clutch.

Q. (By Mr. Fryer) You haven't answered my question, which was merely that you kindly enumerate by reference to the reference characters applied thereto those parts of the mechanism shown on Exhibit 34 which constitute the automatic means for moving the clutch to neutral position. [486]

Mr. Geisler: I beg your pardon, I think, Your Honor, that the witness has answered that question.

The Master: Well, except that he has not carried out the entire lettering, I think that is true. If counsel desires—and perhaps for the purpose of the record it is well to do so, follow that—you have gone along to the stops LS on shaft GB and its connection with the lever IL. Now, carry the rest of it through there by appropriate reference to symbols.

A. Yes. For the time being we will disregard this——

The Master: Well, now, when you say “this” it means nothing at all in the record.

A. The part, portion, marked in purple. To the end of the arm IL, to which, as previously stated, the rod G B is attached, is also attached an arm—a rod, rather, that connects with the arm FSL. The arm FSL is securely attached to a short shaft S, which is provided with opposed threads, the end of the shaft connecting with a portion of the friction clutch mechanism in such manner that when the

(Testimony of Ronald Shepherd.)

rod L, is moved actually the arm FSL is oscillated, the shaft, threaded portion of the shaft, co-acting with the nut which is fastened to the frame—it has no number—causes this shaft S to also move,—to rotate slightly, causes the friction clutch mechanism to be rocked either one way or the other depending on whichever way the rod L is moved.

Q. (By Mr. Fryer) In your direct testimony you were interrogated about some mechanism which was described to you as automatic means for moving the clutch to neutral position under certain conditions. I will now ask you to state whether you understand that the parts marked LS on Exhibit 34 are part of the means which automatically move the clutch to neutral position? Are they or are they not part of those automatic means for moving the clutch to neutral position? [487] A. They are.

Q. All right. Now, is the part Z which you referred to here on your cross examination a moment ago a part of the automatic means for moving the clutch to neutral position? A. It is.

Q. Is the part GB, a part of the mechanism on 34, one of the parts which functions automatically to move the clutch to neutral position?

A. It is.

Q. Is the part marked HL a part of the means which you have referred to as automatic means for moving the clutch to neutral position?

A. Not necessarily. HL is a hand lever.

(Testimony of Ronald Shepherd.)

Q. When you say "not necessarily" what do you mean?

A. I mean that the automatic mechanism would function without the lever marked HL.

Q. The lever HL is for operating the mechanism by hand, is that your understanding? A. Right.

Q. When the clutch is moved to neutral by hand will you state whether or not the part marked L on Exhibit 34 performs any part of the work of pushing the clutch into neutral? A. It does.

Q. Does the part marked FSL perform any part of the work of pushing the clutch to neutral when the mechanism is operated by hand? A. It does.

Q. Does the part S also function when the mechanism is operated by hand to move the clutch to neutral? A. Yes.

Q. Is that also true of the part marked IL and IS? A. Yes, it is. [488]

Q. When the mechanism is moved to neutral position by operation of the hand lever HL do either of the parts marked LS perform any work on Exhibit 34? A. No.

Q. Does the part EB perform any work when the clutch is moved to neutral position by the handle HL on Exhibit 34? A. No.

Q. So that the parts LS, EB and GB in the mechanism shown on Exhibit 34, perform work only when the clutch is moved to neutral automatically, is that your understanding? A. No.

(Testimony of Ronald Shepherd.)

Q. They work when the clutch is not moved automatically, is that your understanding?

A. One of those parts mentioned, the rod GB, would, of course, have to move when the arm IL moved.

Q. Does it perform any work, the rod GB, when the clutch is placed into neutral by use of the handle HL? A. No, it performs no work.

Q. So that none of the parts marked EB, LS or GB performs any of the work of pushing the clutch into neutral when the clutch is so moved by hand using the lever HL, is that right? A. Right.

Q. In other words, then, the parts LS, EB and GB perform work in pushing the clutch to neutral solely and only when the clutch is automatically moved into neutral position is that right?

A. Right.

Q. Will the parts LS, EB and GB automatically perform the function of pushing the clutch into neutral when there is no load in the machine?

A. Yes.

Q. Did you ever see a machine in operation having the construction shown on the Exhibit 34? [489]

A. Only at a distance.

Q. Did you ever inspect that mechanism in an actual machine at close range? A. Yes.

Q. Where was that machine?

A. Inman-Poulsen Lumber Company.

Q. On what date? A. A week ago today.

(Testimony of Ronald Shepherd.)

Q. Was that the first time that you had given that sort of mechanism any close inspection?

A. That was the first time that I had really studied the actual mechanism.

Q. Did you see any mechanism whatsoever in the machine which you inspected at Inman-Poulsen Lumber Company which functioned to move the clutch into neutral position by engagement with the load of lumber in the machine? A. No.

Q. There was no such mechanism in the machine you inspected at Inman-Poulsen Lumber Company, was there? A. No.

Q. Your answer is that there was not?

A. There was not.

Q. Is it your understanding of the mechanism shown on the chart, Plaintiff's Exhibit 48, that it contains a frame, load lifting means, a means of manually moving the clutch to operative position, means for transmitting motion from the source of power to the load lifting means comprising a clutch that can be set in neutral position to cause the load lifting means to move in either direction, and means for braking the transmitting means whenever the clutch is moved to neutral?

A. No. There is not any brake shown on this exhibit at all.

Q. Is it your idea then that the mechanism shown on this chart, [490] Plaintiff's Exhibit 48, is one substantially the same as the various mecha-

(Testimony of Ronald Shepherd.)

nisms which I referred to in my previous question, or substantially different from a machine containing those mechanisms mentioned in my question?

A. With the exception of the brake it is very similar.

Q. Well, does that make any great difference in your opinion whether the brake is included in the mechanism on Exhibit 48, or not?

The Witness: Would you mind repeating that question?

(Last question read.)

A. In view of its operations?

Mr. Fryer: What is that answer, please?

The Witness: That is a question: In view of the operation of the mechanism?

Mr. Fryer: Are you asking me a question?

The Witness: Yes, if you please.

Q. Well, I will put it this way: Will you state whether or not the construction and operation of the machine shown on the chart, Plaintiff's Exhibit 48, differs in any substantial respect from a machine containing a frame, load lifting means, means for transmitting motion from the source of power to the load lifting means comprising a clutch that can be set in neutral to move the load lifting means in either direction, a means for manually moving the clutch to neutral, automatic means for moving the clutch to neutral position upon movement of the load lifting means a predetermined

(Testimony of Ronald Shepherd.)

extent in either direction, and a brake automatically applied when the clutch is placed in neutral?

A. The addition of a brake mentioned requires of course corresponding parts which would have to be added to the exhibit, drawing shown by Exhibit 48, in order to make a mechanism similar to drawing No. 1 or Exhibit 33, similar in operation.

Q. Would you have enough mechanical knowledge and experience to add such a part to the mechanism shown on Plaintiff's Exhibit 48? [491]

A. Well, I believe I could design a brake that would work effectively on any machine, regardless of a lumber carrier.

Q. That would not be a very difficult thing to do, do you suppose?

A. Well, on the basis of my past experience, no.

Q. Well, with your mechanical training and experience, you readily would know how to add to the structure shown on Plaintiff's Exhibit 48 a brake which would be applied to the transmitting means whenever the clutch moved to neutral position?

A. Well, it would require some invention and considerable mechanical design to add a brake to that mechanism.

Q. You have made inventions of your own, have you, in the past? A. Yes.

Q. You ever obtain any patents on them?

A. No.

(Testimony of Ronald Shepherd.)

Q. The inventions that you made were just ones that were created by you and left to go without any effort to patent them?

A. They have never been patented to my knowledge, although most of the inventions were in the line of work while gainfully employed by the government and other firms, and while they are in use I don't suppose they have been patented.

Q. That is, you personally have never made any application for patent on any of the developments you consider your inventions? A. No.

Q. What makes you think that it would require invention to put a brake on the mechanism shown in Exhibit 48?

A. Well, because there is absolutely no provision on that drawing for a brake. There is no suggestion of a brake, or, in fact, to make a brake would be starting at the very bottom.

Q. Had you ever seen any hoisting mechanisms of any kind before you saw the hoisting mechanism about which you testified here?

A. Hoisting mechanism?

Q. Yes. [492] A. Yes.

Q. Did you ever see any brakes on them?

A. Yes.

Q. Are they complicated mechanisms?

A. In some cases.

Q. Many of them simple? A. Yes.

Q. Did the simple ones function satisfactorily?

(Testimony of Ronald Shepherd.)

A. That would be purely a question of an engineer's opinion.

Q. I am asking you what you saw. The ones that you saw, did they function satisfactorily, in your opinion? A. No.

Q. But you think that to provide a satisfactory operating brake on a hoisting mechanism is something that necessarily amounts to invention; is that your opinion? A. Yes, I think so.

Q. Now you stated that you inspected a machine which you called a Willamette-Hyster machine, which had mechanism in it which moved the clutch to neutral position by contact with the load; is that your testimony? A. No.

Q. You never saw such a machine anywhere?

A. Only on the drawings.

Q. Did you ever see a machine having the complete mechanism shown on the chart, Exhibit 49, in it? A. No, with one exception.

Q. What is that exception?

A. Means for preventing the mechanism rising too far with a load of lumber. In other words, the load of lumber strikes this bar, transverse bar 79, and operates the mechanism to throw the clutch into neutral.

Q. Now is it your testimony that you have or that you have not seen a machine with a bar like the bar 79 on Exhibit 48?

A. I have not seen a machine. [493]

(Testimony of Ronald Shepherd.)

Q. Can you recognize in the chart which has just been placed before you any mechanism which you saw in the Willamette-Hyster machine which you inspected at Inman-Poulsen Lumber Company about a week ago?

A. Yes. That is very similar to the mechanism.

Q. Can you state whether or not it is substantially identical in all of its parts with the mechanism which you saw in the Willamette-Hyster Lumber Carrier at Inman-Poulsen Lumber Company?

A. I would say that it is substantially the same.

Mr. Fryer: We ask to have the chart identified by the witness marked for identification as defendants' Exhibit 52.

The Master: Marked for Identification.

(The chart was thereupon marked for identification Respondents' Exhibit 52.)

Mr. Fryer: And we are handing the Court for its own use a copy of Exhibit 52.

Q. Can you see anything in the mechanism shown on the chart, Exhibit 52, which would differentiate it in any substantial way from the mechanism shown on the charts, Plaintiff's Exhibits 33 and 34?

A. The photograph, Exhibit 52, is of course a more general view. However, most of the mechanism shown on drawing No. 1 and drawing No. 2, or Exhibits 33 and 34, is pictured on Exhibit 52.

(Testimony of Ronald Shepherd.)

Q. Did you see anything on Exhibits 52, 33 and 34 which indicates to you that the mechanisms shown on those several exhibits are not substantially identical in construction and operation?

A. Yes. The nut shown on the chart 52, of course, is not as complete as the nut shown on Exhibit 34.

Q. In what respect is the nut less complete on 52 than on 34?

A. The nut shown on drawing 34 has an associated mechanism which is understood to be attached to a load lifting means, whereas the nut shown on Exhibit 52 does not show any connection with any other mechanism. [494]

Q. The associated mechanism on Exhibit 34 is a group of parts which is moved by the hand in that structure; is that your understanding? A. Yes.

Q. And that part which the nut moves is not shown in the photograph, Exhibit 52; is that your understanding? A. It is not.

Q. And apart from that difference do you find the mechanisms on 52 and on 33 and 34 substantially identical in construction and operation?

A. No.

Q. In what respect do they differ?

A. The bar rod GB is shown directly connected with the arm IL in Exhibit No. 34, whereas in this respect it operates to a slightly different type of arm; the drawing, Exhibit No. 34, of course, showing a long shaft IS, the chart 52 showing a very

(Testimony of Ronald Shepherd.)

short shaft, the chart being rather indistinct as to just what the exact construction is in that part.

Q. Would that difference which you have pointed out in your opinion materially affect the operation of the mechanism as a whole?

A. No.

Q. Now do you find any other difference which in your opinion is material from the standpoint of substantial identity of construction?

A. No. In a general way the two mechanisms, one indicated by a photograph and the other indicated by a drawing, are practically the same in operation.

Q. In the mechanism of Exhibit 48 does the part 67 perform any function in moving the clutch to neutral position when there is no load in the machine, as shown in Figure 5? That is the same as this chart. A. No.

Q. The stops in the mechanism of Exhibit 48 which function to move [495] the clutch to neutral position when there is no load in the machine are numbered what? A. 68 and 77.

Mr. Fryer: No further questions.

The Master: Any redirect?

Mr. Geisler: No, your Honor. We rest.

The Master: You may be excused, Mr. Shepherd.

(Witness excused.)

MOTION TO STRIKE

Mr. Fryer: At this time the defendants move to strike from the record the patent No. 1,838,939, Plaintiff's Exhibit 47; the chart representing a view of that patent, Plaintiff's Exhibit 48; the file wrapper of that patent, which is Plaintiff's Exhibit 51; and all of the testimony of the witness who just left the stand, Mr. Shepherd, in connection with those exhibits, on the ground that they have not been connected up in any way to show that there is any materiality or relevancy between the structure of this patent No. 1,838,939 and any of the matters before the Court. In connection with the motion we also include Exhibits 49 and 50, which are certified copies of assignments pertaining to this extraneous patent of the defendant. The testimony of the witness I believe proves conclusively that there can be no materiality or relevancy to this construction.

The Master: Well, I am going to deny the motion for the time being, until I can be better advised upon that matter.

Mr. Fryer: Do I understand the plaintiff rests?

Mr. Geisler: Yes.

DEFENDANTS' OPENING STATEMENT.

Mr. Fryer: The defendants would like to proceed with their statement, if your Honor please, at this time, and in doing that I want to advert briefly to the patents in the cause. [496]

The plaintiff corporation, of course, we are already familiar with. The suit is brought against two defendants, the Clark & Wilson Lumber Company and the Willamette-Hyster Company. The Clark & Wilson Lumber Company is engaged in lumbering operations, and in those operations it uses a large number of trucks for elevating and conveying timber from place to place. In that work it uses two different makes of machines. One group of machines operated by that defendant is made by the Ross Carrier Company of Benton Harbor, Michigan, a non-resident. Other carriers of the defendant Clark & Wilson Lumber Company are made by Willamette-Hyster Company, a local concern, and that concern has been joined with the defendant in the suit, so that we here as attorneys for the defendants represent the user of the lumber carrier, the Clark & Wilson Lumber Company, and the Willamette-Hyster Company, the Company who happens to have made some of the carriers used by the Lumber Company.

Although the issues before the Court in this cause are comparatively simple and clear cut, they are not the usual ones in patent litigation. I think perhaps that is due to the fact that some of those issues arise over defenses which the defendants have here, and those defenses are so conclusive and meritorious that they seldom arise in controversies which go to trial. Because of that situation I think a fairly detailed outline of the proofs which the defendants propose to prove and a brief reference in

that outline to the rules of law pursuant to which the proofs will be offered will be most helpful in orienting the Court and enabling it to have clearly in mind the particular issue and the rule of law under which the evidence is being presented.

The issue which I shall first mention is one which is seldom presented in the trial of a patent case, but there are many court decisions in the books dealing with it. That is the defense presented by these defendants to this effect, that the machines here accused of being an appropriation of the plaintiff's [497] patented combination and the combinations in those accused machines which are supposed to give rise to that appropriation are substantially identical in every respect with combinations found in the art prior to Gerlinger, prior to the patent in suit.

Now, the authorities or the rule of law pursuant to which our proofs are going to be offered to show that the accused machines are in essence prior art machines and therefore cannot infringe I have here on some sheets of paper and I shall hand a set of them to your Honor. Briefly, they are to this effect:

Take, for instance, the case decided by the Circuit Court of Appeals for the Sixth Circuit in *Houston vs. Brown Manufacturing Company*, the gist of that decision——

Mr. Geisler: If the Court please,—Can you give me the——

Mr. Fryer: Yes, I shall come to that—270 Fed. 445. The gist of the proceeding in that case is expressed in the following language of the Court:

“Defendant’s machines are substantially in line with the prior art and therefore do not infringe in any particular.”

A general statement of the principle pursuant to which the proofs I am now referring to will be offered is found in *corpus juris* at page 293 of Volume 48, as follows:

“Nor is it infringement to use something which was old, and which the public had a right to use, prior to the patentee’s invention.”

In our own Ninth Circuit Court the rule pursuant to which these proofs are going to be offered is found in a case in which our Ninth Circuit Court of Appeals said:

“The Stafford patent, No. 860,418, for a process of effecting combustion of crude petroleum, consisting in the con- [498] tinuing discharge into a confined area of liquid oil, at a distance from the point of combustion, of an oxygenous fluid under pressure sufficient to effect substantially perfect combustion, held not infringed, in that defendant’s process did not differ from those disclosed by patents prior to plaintiff’s patent.”

Mr. Geisler: Would you kindly give me the citation?

Mr. Fryer: 263 Fed. 86,—and I shall hand a copy of those excerpts and others to Your Honor.

Mr. Geisler: Also to me?

Mr. Fryer: Oh, yes, I will have a copy for you in a moment.

Now, as Your Honor can see, that defense, that is, that the accused devices are substantially identical with the prior art devices and therefore cannot infringe, is one which turns upon a pure fact question, wholly unrelated to the construction or interpretation of the patent in suit. In other words, the defendants are going to come in here and are going to present proofs which they will show are a complete demonstration that the accused combination originated in and is found in machines prior to the patentee of the patent in suit and that, therefore, it cannot be any appropriation of what his patent covers. So that we will have, then, a simple fact issue, a simple matter of comparison between the structures said to be an infringement and structures contained in the prior art. That comparison will be made by the use of charts and testimony explaining that identity.

For instance, we will have included in that art some prior patents, as, for instance, the prior patent to Towson, in which we will have——

The Master: Palson or Towson?

Mr. Fryer: Towson, (Spelling) T-o-w-s-o-n. That is a truck,—the evidence will explain that it is a truck with a positive [499] mechanical lift to raise and lower the purple-colored load-lifting means. We will also point out that that load-lifting means is

mounted for movement in a green frame. The evidence will indicate that in this mechanism there is included a yellow structure shown on the chart which is a means for transmitting motion from a source of power to the load-lifting means, including a clutch or controlling mechanism which can be set in neutral or can be set to move the load-lifting means either in an upper or lower direction. The evidence will show that this mechanism contains this red-colored series of devices comprising stops on a rod, just as we have stops on a rod in the defendants' machine, which actuate this power-controlling mechanism to set it into neutral automatically when the load-lifting means reaches a predetermined point in either direction. Other evidence of that sort will be offered throughout the first phase of the case, then we shall have a comparison between the accused construction and these various constructions in the prior art showing that in all substantial respects the accused combination of parts said to be an appropriation of something of the plaintiff's is in fact the employment of a combination found in numerous prior art structures.

With respect to this comparison, I failed to mention that it also contains the automatic brake, colored orange, which we find in all of these devices.

Now, in explanation of that evidence which we shall present I want to say something about the coloring which will appear upon all of these exhibits. The theory of the colors upon the defend-

ants' charts is that a chosen color is assigned to each of the various mechanisms making up one of the elements in the accused combination, and that color scheme is apparent with each chart as it goes in. I believe Your Honor can notice [500] that from the copies of these charts which will be handed to you as our proofs are offered.

We have in these various charts colored red the means which we find in the prior art and in the defendants' structure for automatically moving the clutch to neutral position upon movement of the load-lifting means in either direction. I particularly call Your Honor's attention to that because when we come to the patent in suit later on Your Honor will observe that in that case the only thing we can color red in the patent is the language in the claim, but nothing in the drawings of the mechanism, because there is no mechanism in the patent that really performs that function according to that language. We shall come to that further in a moment.

So that all of defendants' physical evidence in the way of charts then will have this same color scheme, which I believe will be an aid to the understanding of the operation of the mechanism as well as to the theory of our defense.

On this defense that the defendants' structure is in effect a prior art device you will find throughout that you can trace the corresponding parts by those colors in the prior patents and in the accused structure.

Now, related to that defense is another one which has found its way into this case at this time by reason of an admission in the record. Your Honor will recall the plaintiff's specific and comprehensive admission that the defendant Willamette-Hyster's small elevator or lumber carrier, about which certain witnesses were interrogated, is not an infringement of the patent in suit in any respect. Based upon that admission we shall offer proof to show that the accused construction used by Clark & Wilson is substantially identical in construction and function and mode of operation with this small Willam- [501] ette elevator or carrier which plaintiff asserts positively does not contain anything covered by the patent in suit. Naturally it will follow that if we establish that identity, as I feel confident we shall, then it will follow also that the accused device is not an infringement, because naturally if one machine does not infringe all other machines identical with it will not infringe, and the proofs in that regard will indicate this to Your Honor, that in this small Willamette carrier which we know does not contain anything covered by the patent we have a reversing clutch mechanism, colored yellow, which is interchangeable as to its parts with the reversing clutch mechanism contained in the carrier which the plaintiff contends does infringe. We have a brake mechanism, colored orange in the evidence, in the charts to be offered, which is interchangeable in the small not-infringing

elevator with the brake mechanism contained in the machine which they contend does infringe. We have in this small machine which we know is not the machine of the patent in suit mechanism, shown in red, which is so constructed that its stop mechanism on the purple-colored load-lifting means strikes that red mechanism which is connected to the yellow clutch operating means whenever the load-lifting means reaches a predetermined point in its upper or lower direction and throws the clutch to neutral and applies the brake, and that mechanism we will show is substantially identical in all respects with the corresponding stops and linkage in the carrier which the plaintiff says does contain the invention of the patent in suit.

There will also be evidence offered to show that the mere fact that in the small elevator the lumber is picked up by pushing the lifting means under the lumber from one side instead of pushing the load-lifting means under the lumber from the end [502] makes no substantial difference in construction of mode of operation of the machines whatever.

Now, on both of those issues, or, rather, both of those items of proof, which the defendants will offer, Your Honor will find that we are dealing simply with a plain fact question of identity between structures, and in measuring that question of identity we can completely turn our backs on the patent in suit. Those two items of proof require no consideration of the patent in suit whatsoever. For

instance, if the Court should find, as we contend it should, that the accused combination in defendants' carrier is substantially identical with that found in any of these prior patents, then the bill must be dismissed, and that can be done without ever taking a look at the patent, because the mere fact that this accused combination is a prior art combination is an end to the investigation.

The same is true with the defendants' small carrier, which is now a record non-infringing structure. If after considering the proofs tending to show identity which will be offered the Court should find, as we contend it should, that the two mechanisms, defendants' small elevator and defendants' large elevator, are substantially identical in construction and mode of operation, then the bill will have to be dismissed, and that can be done, again, without looking at the patent in suit whatever.

So then we shall have those two items of proof dealing with the simple fact comparison of structures, involving no consideration of the patent in suit, no interpretation of the claims and no problems of law other than the broad rule which I have called to Your Honor's attention that the prior art cannot infringe.

The next item of evidence to be offered by the defendants is also a fact question dealing with identity or [503] lack of identity between mechanical things, but this one is directed not so much to the parts themselves as to the mode of operation. The

proofs on this issue, or the proofs included in this item, will be offered pursuant to the rule which I have already had occasion to call the Court's attention to. It is expressed in the Ninth Circuit in the case of *Riverside Heights Orange Growers' Association against Stebler*, 240 Fed. 703, in the following language;

“ ‘If the device of the respondents shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided.’ ”

The well-known text on patent law expressed the same rule pursuant to which these proofs will be offered in this language:

“ ‘If the mode of operation of an alleged infringing thing is substantially different from that covered by the claim alleged to be infringed, it follows that the charge of infringement must be negatived; but if the mode of operation is substantially the same, it does not follow that the charge of infringement must be affirmed. In that case the question must be decided by some additional criterion. To establish an infringement of claim, the facts must be subjected to several successive tests. If the case fails on either of those tests, no further inquiry need be made; but an infringement cannot be affirmed till all those tests have been applied and have been withstood. The first of these is that which relates to identity of mode of operation.’ ”

And also some Supreme Court decisions and other Circuit Court of Appeals decisions to the same effect. I shall hand Your Honor copies of those as illustrating the rule pursuant to which the item of proof to which I am now addressing myself will be offered. [504]

On this question of mode of operation the comparison will be, of course, between the machine shown in the patent in suit and the machine contended to contain a combination identical with that of Claim 4 in suit.

I think Your Honor's attention has already been directed to the fact that the machine of the patent in suit has a very distinct and characteristic mode of operation. It is one by which the presence of a load in the machine is indispensable to operation of those mechanisms in the machine which terminate upward movement of the load-lifting device. That means is the bar which we have here heard about before, the bar 67 of the Gerlinger patent. In our proofs we shall offer evidence of the construction of this machine not only by the patent but by a machine itself illustrative of the structure of the patent, and in all of those we have colored the bar 67 black because it does not correspond with anything else in the case.

The language of the claim on this chart is colored red because it describes structure found in the prior art, but it does not describe what the patent structure really does as far as its mode of operation is concerned, but the evidence offered to explain this

structure will show conclusively that to operate the one and only machine which was ever constructed according to the drawings of that patent it is necessary to have a load of lumber in the machine, as shown in blue on the chart Exhibit 25, engaging the bar 67 at the right time and to the right extent in order to make that bar function. The evidence will indicate that should an operator place in this machine a load having a notch in it so that a portion of the load would strike the frame before the bar 67 would be engaged the machine would be destroyed. If the operator should place in the machine a load not high enough throughout its length to engage the bar 67, again the machine would be destroyed, because the rack bars would move [505] upwardly to the extent of their teeth, there would be no more teeth there, and the pinions would bump around until we have the whole thing disposed of in short time.

Now, that is characteristic of the machine of the patent. However, it is the direct antithesis of the operation of the prior art and of the defendants' accused combination. In other words this idea of the patent in suit of having something that the load comes up and pushes in order to stop upward movement of the load-lifting device was an idea that the patentee had and put in one machine but nobody ever saw or used it afterwards. All the prior art uses a lift control stop, and defendant in building of a practical machine used that type of a lift con-

trol stop and did not use this funny stop of the patent in suit which works only if you have got the right size and shape of load in the machine. In other words, the defendant has adopted the mode of operation characteristic of the prior art and foreign to the patent in suit. It has done so for obvious reasons,—it is a much better mode of operation.

So that the proofs in this regard will show that there is a fundamental, complete and distinctive difference between the respective modes of operation of the machine of the patent in suit and the defendants' machine, and for that reason the requisite identity between the patented and the accused structures is lacking, and that the bill must be dismissed.

The evidence also will show that there is nothing in this patent granted to Mr. Grab which in any way contradicts that idea. It is true that in that patent granted to Mr. Grab a bar similar to the bar 67 of the patent in suit is shown, but the mere fact that a patent was issued with a structure in it is no proof that that structure has ever been employed, and the proofs here conclusively will show that this defendant has never manufactured and used within six years prior to the filing [506] of this bill a machine containing any such construction. It has proved wholly ineffectual in operation. Anyone who has ever tried it has had to abandon it, just as the proofs already offered here show that the plaintiff abandoned its structure, as he built only one ma-

chine containing it and that machine did not stay with him very long.

Now the next group of facts which the defendants shall offer has to do more or less with the construction of the patent in suit and is in effect a corollary to the issue which I have just been discussing. That evidence will be facts showing that the broad, all-inclusive language of the claim sued upon is so broad, that it includes all of the prior art, and that unless that language is restricted so that it refers to and describes solely and only this black bar 67 of the drawings of the patent it will be a void claim because it will describe the prior art. In other words, those proofs will be offered pursuant to the well-known rule that it is the duty of the Court to so construe the language of a claim as to preserve its validity even if to do so proves that the accused device does not come within the language of the claim. That rule of law is well illustrated in numbers of cases, and I shall hand Your Honor excerpts from some of them, merely referring to one of them now in order to indicate the rule of law pursuant to which our proofs on this issue will be offered. In the case of Burt against Ritchie, 251 Fed. 909, the rule is expressed in this manner:

“It is unnecessary to do more than refer to the proposition that the claims must be so interpreted as to give them a valid meaning, if possible, and that, if they would be rendered invalid by an interpretation so broad as to cover the defendant’s struc-

ture, it is to be presumed that the plaintiff in using the language which he put in the claims and which [507] was allowed by the Patent Office, was described that which can be held patentable; in other words, that the claims must be limited to the patentable invention, even though reference to the specifications, drawings, and of prior art is had, in order to learn the limitations referred to."

Briefer reference in a more recent case is that of *Black & Decker* against *Baltimore Truck Tire Service Corporation*, 40 Fed. (2d) at 910. The Circuit Court of Appeals for the Fourth Circuit there expressed the rule in this manner:

"While it is true that courts will not ordinarily interpret a positively recited generic expression as limited to the precise instrumentality disclosed by the patent, they will do even this where such narrow interpretation is necessary to distinguish the claim from the prior art and uphold the validity of the claim."

I shall hand your Honor excerpts of those cases and similar ones.

Now, the evidence offered pursuant to that rule of law will indicate this, that the element of the claim in suit which is described as automatic means for moving the clutch to neutral position upon movement of the load-lifting means to a predetermined extent in either direction will describe countless structures in the prior art. As will appear apparent from various evidence, including charts of

the prior art offered, it will be seen that that language and the combination of the claim as a whole is found in its entirety in these elevating and hauling trucks of the prior art. The only way in which that claim can in any manner be distinguished from the prior art is by restricting the language of that element E of the claim to mean a structure containing the load control stop characteristic of the Gerlinger machine. If that is done, then [508] the claim differs from all the prior art, because the only and single thing by which the Gerlinger construction differs from these prior structures is that one peculiarity of it whereby the upward movement of the load-lifting means is terminated by a mechanism engaged by the load. For instance, the evidence will include a prior patent granted to Nicholson, et al, many years ago. That patent, the evidence will show, contains the green frame structure, which is an elevator structure that can either stand on its own feet or it can be mounted on a truck for movement from place to place. The evidence will show that it contains load-lifting means moving within that frame and means for transmitting power from the source of power to the load-lifting means, including a power-controlling device which can be set in neutral or to cause the load to go up or to go down. It has manual means for effecting that operation, and if you take the broad language of the claim it has automatic means for moving the clutch to neutral position upon movement of the load-

lifting means a predetermined extent in either direction. The only way that that language can be differentiated from this prior patent, as well as others which we shall offer, is by interpreting that red language of the claim to mean something other than these red stops of the prior art, but a contrary thing, the black-colored stop of the patent in suit, which is purely a load control stop.

Another illustration of the evidence to be offered in this regard is the patent to Carr. We have a patent showing a structure of a very well-known instrument in industry, these little trucks used for raising and lowering loads of any kind of industrial products and transporting them from place to place. These very trucks as shown in this patent, the evidence will show, have been sold extensively throughout the country, and it contains the entire combination of the claim [509] in suit. The only way that you can distinguish the combination in that prior commercial and patented structure is by restricting the red language of the claim, automatic means for moving the clutch, and so forth, to the black load control stop of Gerlinger. If that language is not so restricted, then it describes this prior Carr truck completely and perfectly and it would be void, and according to the rule of law that we will be relying upon that construction must be given to the claim in order to save it.

Of course, Your Honor may conclude that perhaps if this claim does describe these prior struc-

tures in the way that we have shown that the claim is no doubt void. Perhaps it is. If you take the broad language of the claim as it reads we have what you might call an anticipation. However, the Courts are pretty liberal with patentees, but they say if there is no way of saving him from that drastic result of his effort to cover the entire art by claiming more than he has really contributed to the art that should be done, and in that case they urge upon the courts not to so construe claims. However, in this case it is not necessary to go far enough to hold the claim void. We are not going to present evidence intended solely to be anticipation of the claim in suit. We are presenting evidence to show lack of identity between the patented combination and that of the defendant, and once that issue is determined then it becomes unnecessary to go further and decide whether or not we have here a square anticipation of the claim.

However, dealing with the validity of the patent, we have one issue to which we will direct these proofs, and that is that the patent unavoidably and necessarily is void for lack of invention. It is true that you can differentiate the language of this claim from the prior art by restricting it to that peculiar stop of the patent in suit, but the evidence which we [510] will present will show that even limited and restricted to that this combination of the patent in suit does not differ in any inventive sense from the prior art. In other words, you take all the prior

art and see what is in it and you compare that with the disclosure of the patent in suit and ask yourself, Now, has this patentee, Gerlinger, progressed beyond this prior art by the use of any inventive skill? Our evidence will show that the answer can only be no, he did not progress beyond the prior art, he retrogressed, he resorted to a structure with this load control stop, which is not progress over the art, but an abandonment of the desirable practical stops which were free to be used by anyone. So as far as any mechanical skill in improving on the art, the disclosure of the patent does not show even the expected skill of the calling, and for that reason our proofs will be offered in support of the combination of the defendants that the patent is void for lack of invention.

We come next to the last issue to which the defense will be directed, and that is the defense of laches set up in the pleadings. The defendants will show that the combination which is accused to be an appropriation of something belonging to the plaintiff is one which one defendant to this cause has been using for over eight years, with the plaintiff's knowledge and without protest; that the combination which another of the defendants is using is one which it has been using for over twelve years, with the plaintiff's knowledge and without any protest on his part; and the contention of the defendants based upon those proofs will be that one who is so lax in asserting his rights is entitled to no con-

sideration at the hands of a court of equity and that his bill should be dismissed and both compensatory and injunctive relief be denied for that long, unreasonable and unexplained delay. [511]

With respect to the defendant Clark & Wilson Lumber Company it will become apparent from the evidence that as early as 1923 it acquired, became the owner of, a machine containing a combination in every respect a duplicate of the combination which is now charged to be an infringement and which it is now using. The evidence will show that Clark & Wilson's use of these machines containing that combination was specifically and directly called to Mr. Gerlinger's attention. He was asked, "Why don't you sue this Clark & Wilson Lumber Company for using this machine that seems to contain what your patent apparently covers?" and Mr. Gerlinger refused and has continued to refuse to sue ever since.

Now, in reliance upon that conduct the defendant Clark & Wilson Lumber Company continued its acquisition of machines containing that combination of parts. It did so to the extent of some fifty thousand dollars additional expenditures in machines containing that same combination, and our contention based upon that evidence will be that it is too late now for the plaintiff, after having permitted the defendant Clark & Wilson Lumber Company to spend all this money on machines containing that combination of parts, to come in and say

that they must stop using machines containing that combination and must account for their past use of them.

The same is true with the defendant Willamette-Hyster Company. The evidence will show that for more than eight years it and its predecessors have been making the combination here said to be an infringement. It has done so right under Gerlinger's nose. It will offer proofs to show that he had positive knowledge of what they were doing, he never made the slightest move to enforce any rights which he now at this belated day claims to be his. The evidence will indicate that in spite of his denials of knowledge the facts were directly to the contrary and were such that any rea- [512] sonable man should have known, if he did not know what was going on and he should have protested and made some assertion of rights prior to this belated date.

That, briefly, is an outline of the various groups of facts which we shall offer and the issues to which they will be directed, and with that introduction we will proceed with our evidence, and at this time I will hand to Mr. Geisler a copy of the various authorities which have been handed to the Court and which I have referred to.

Mr. Geisler: Thank you.

Mr. Fryer: May I have a few minutes, Your Honor, and we will be ready to proceed with our proof.

The Master: Yes, we will be at ease for a few minutes.

Mr. Fryer: I wish to offer at this time, and I understand that Mr. Geisler has no objection as to the authentication thereof, a photostatic copy of page 65 of the Timberman for October of 1926. It is now marked Defendant's Exhibit 15 for identification.

At this time we also offer in evidence Defendants' Exhibit 16 for identification, which is page 113 of the November, 1926 issue of The Timberman, that being a photostatic copy of that page.

The Master: That is 15?

Mr. Fryer: I am offering 16, also.

The Master: Well, have you the photostat of 15 as well?

Mr. Fryer: Yes, Your Honor.

The Master: 15, 16 and 17. I am wondering if we can't substitute those in place of the journals themselves?

Mr. Fryer: That is what I am doing right now. I am offering photostatic copies.

The Master: All right.

Mr. Fryer: Likewise, then, we offer a photostatic copy of page 216 of the November, 1926 Timberman, which will replace [513] Defendants' Exhibit 17 for identification. The last offer should be pages 216 and 217.

(The original documents heretofore marked for identification Respondents' Exhibits 15, 16 and 17, were thereupon withdrawn, and photostatic copies thereof substituted in lieu of said original documents and so marked.)

Mr. Fryer: We will call Mr. Hale, please.

CLAUDE M. HALE

was thereupon produced as a witness in behalf of the respondents herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fryer:

The Master: You may state your name and address.

A. Claude M. Hale, route 2, Box 307, Portland.

Q. (By Mr. Fryer) Will you be seated now, Mr. Hale. What is your occupation, Mr. Hale?

A. I am an auto mechanic for Clark & Wilson Lumber Company, repair their gas—all their gas engine equipment, including their lumber carriers.

Q. How long have you been doing that for Clark & Wilson Lumber Company?

A. Thirteen years.

Q. That is the Clark & Wilson Lumber Company who is a defendant in this case?

A. That is right.

Q. Thirteen years. That would be 1923, is that right?

A. Yes, sir. Well, it is over thirteen now. It was thirteen years last September to be exact.

Q. You were doing the same sort of work when you first went to work for Clark & Wilson as you are doing now, is that right? [514]

A. Well, that is right, only now I am working in the shop altogether. At that time I was doing part time driving and part time repairing their car-

(Testimony of Claude M. Hale.)

riers and trucks, their lumber carriers and trucks. Now I am in the shop altogether. Otherwise it is the same type.

Q. What make of lumber carriers did Clark & Wilson have when you first went to work for them?

A. They had two Gerlinger carriers when I went to work there. Three days later they purchased the Ross carriers. They had them ordered at that time. I was hired to go to work at that time, but I went to work three days before they arrived, so they had two Gerlingers and two Ross carriers.

Q. Did you have anything to do with the delivery of the two Ross carriers which you state Clark & Wilson got at that time?

A. Yes, I took them out of the box cars,—the two out of a box car.

Q. Did you have anything to do with putting them into commission?

A. Yes, I serviced them at that time.

Q. And when Clark & Wilson received these two carriers you speak of did they identify them by any numbers or in any other way?

A. Yes, they numbered one of them number 1 and one number 2.

Q. Did you make any record, as part of your work for Clark & Wilson, concerning the placing in service of the number 1 and number 2 Ross carriers?

A. Yes, I did.

Q. Have you got that record with you?

(Testimony of Claude M. Hale.)

A. Yes, I have it over there, here it is.

Q. Will you state whether or not the various entries in that book are made in your own handwriting.

A. They are.

Q. Are any of those entires in that book dated?

A. Yes.

Q. And will you state whether or not you placed the dates in the [515] book at or about the time when the events entered under those dates occurred.

A. Yes. Well, No. 1 Ross Carrier was purchased on September 15th, 1923; No. 2 September 15th, 1923.

Q. Will you point out to me the entries in the book which you have just referred to.

A. It is No. 1 Ross Carrier on September 15th, 1923, No. 2 Ross Carrier on September 15th, 1923 (indicating).

Mr. Fryer: Do you wish to look at this, Mr. Geisler?

Mr. Geisler: No, thanks.

Q. (By Mr. Fryer) I notice that under the heading No. 1 Carrier September 15th, 1923, there are a number of dates with entries under each, such as clutch, pilot bearing installed, and other items of that sort. Will you state whether or not there is any other page in this record book of yours besides the one headed No. 2 Carrier September 15th, 1923, which relates to that carrier.

The Witness: Will you repeat that again, please.

(Testimony of Claude M. Hale.)

Mr. Fryer: I will have the reporter read it to you.

(Last question read.)

A. We rebuilt that carrier—we took parts off of that machine; I won't say rebuilt it, either, but we took a lot of the parts, such as steering arms and drive shafts, steering assembly and wheels, driving heads, and parts of that nature, to build another machine. We wanted a wider carrier, one that was two feet wider and six inches higher, so we took that to the blacksmith shop and the blacksmith and I and an electric welder built another machine and we put that into service on November 26th, 1932, and we numbered that No. 11 Carrier.

Q. Have you an entry in your book indicating this work which you did on No. 1 carrier in November of '32?

The Master: Is that No. 1 or No. 2? [516]

Mr. Fryer: No. 2. Will you read the question, please?

(Last question read.)

A. No, I haven't. I haven't that entry. The only thing that I have is that we put in into service at that time and we numbered it No. 11. What we did I didn't keep any record of. We just made a bigger machine out of it and we put a larger motor in it. We used all the parts we could off the smaller machine, and I didn't write that into the book. I just

(Testimony of Claude M. Hale.)

numbered it. It would take too much time to write all that in, everything that I did.

Q. Have you any entry in your book about this No. 11 machine that you made up in that way?

A. I have a lot of parts, a lot of work that we have done on that machine since that, listed under our No. 11 carrier from the work that we done on No. 11 machine since that, maintenance work on it that I have listed in the book.

Q. Will you point out to me where your No. 11 carrier is listed in the book, please.

A. Right here (indicating).

Q. You have shown me a page with the words "Carrier No. 11, 11/26/32." Will you state whether or not that is the entry which you made at the time that this No. 2 carrier was reconstructed as you have described.

A. That is right. I reconstructed that machine. I entered it in the book, registered it as No. 11 carrier.

Mr. Geisler: Pardon me, I can't understand that. I thought you said nineteen twenty-six.

Mr. Fryer: Eleven twenty-six thirty-two.

Mr. Geisler: Eleven twenty-six thirty-two; I see.

Q. (By Mr. Fryer) The entries under the heading Carrier No. 11 in your book, are they also in your handwriting? A. They are.

Mr. Fryer: Have you any objection to photo-static copies of [517] those pages in lieu of the originals?

(Testimony of Claude M. Hale.)

Mr. Geisler: No.

Mr. Fryer: At this time we will offer photostatic copies of the pages of the witness' record book under the heading No. 2 Carrier September 15th, 1923, and No. 11 Carrier 11/26/32, and ask that those photostatic copies of those two pages be marked Defendants' Exhibit 53. We also offer in evidence a copy of the page of the witness' record book under the heading No. 1 Carrier, September 15th, 1923, and ask that that be marked Defendants' Exhibit 54.

The Master: Any objection?

Mr. Geisler: No, your Honor.

(The page headed No. 2 Carrier, September 15th, 1923, and the page headed No. 11 Carrier, 11/26/32, were thereupon received in evidence and marked Respondents' Exhibit 53, and the page headed No. 1 Carrier, September 15th, 1923, was received in evidence and marked Respondents' Exhibit 54, photostatic copies to be substituted.)

Q. (By Mr. Fryer) After your company, Clark & Wilson, got its No. 2 Ross Carrier, will you state whether or not it kept on using it right along up to the time that it was rebuilt?

A. They used it practically all the time until a few months before we rebuilt it, I can't state exactly how long, it is quite a while ago. But it got into a bad condition. The old Ross carrier frames

(Testimony of Claude M. Hale.)

were not very solid and they would spread out at the bottom and, therefore, you would drop loads, and business was pretty quiet at that time, so they didn't want to rebuild it, and they tied it up, took it out of service for a short time. Now I can't say for sure, but then they finally decided to build a wider machine; they needed more wide ones and less small ones, and so they decided to build a wide one. But outside of that it was in service all the time.

Q. After that No. 2 machine was made wider, as you say, did [518] Clark & Wilson continue to use it after that? A. Yes.

Q. It still has that machine?

A. They still have that machine.

Q. At the present time where is that machine which is now called No. 11? Is it not at your plant, is it?

A. Why, it is in the possession of the Willamette-Hyster Company.

Q. Have you recently inspected that No. 11 machine of yours in the Willamette-Hyster's possession? A. I have.

Q. Do you find it in the same condition as far as its parts are concerned as it was when you delivered it to defendant Willamette-Hyster Company?

A. Outside that it had been cleaned up some and painted, colored a little, but otherwise it was the same.

(Testimony of Claude M. Hale.)

Q. I show you a group of three photographs which are marked 38-A, 38-B and 38-C, and ask you to state whether or not you have compared those photographs with your No. 11 Ross carrier.

A. Yes.

Q. Will you state whether or not those photographs truly represent the construction of that Ross carrier as you saw it? A. They do.

Mr. Fryer: We now offer in evidence the photographs heretofore marked for identification 38-A, 38-B and 38-C.

The Master: Any objection?

Mr. Geisler: No objection.

The Master: 38-A, B and C are received. What machines are those?

Mr. Fryer: Defendant Clark & Wilson's Ross Carrier.

The Master: They are both the same model, 1 and 2 the same model?

Mr. Fryer: This is No. 11 machine. It is the original No. 2 [519] that has been widened out.

The Master: All right.

(The three photographs of Clark & Wilson's Ross Carrier heretofore marked for identification Respondents' Exhibits 38-A, 38-B and 38-C were thereupon received in evidence.)

Q. (By Mr. Fryer) Will you tell us whether or not this No. 11 Ross carrier of your Company has any parts in it for automatically stopping the up-

(Testimony of Claude M. Hale.)

ward movement of the load lifting device when it reaches an upper limit? A. It has, yes.

Q. Does it also have parts which automatically stop the downward movement of the load lifting means when it reaches a certain point?

A. Yes.

Q. Can you point out that automatic mechanism for doing that in the photographs Defendants' Exhibits 38-A, 38-B and 38-C? And, if so, merely refer to them by their color.

A. Do you want me to point them out?

Q. Just describe it if you find it there.

A. Well, in raising your load when those lifting hooks start up, they are the ones that lift the load; when they come up to a point about 14 inches, approximately 14 inches, this red lever—it pushes this red lever; the red lever continues through this rocker arm and over. It is in a vertical position when it pushes it and it continues through a rocker arm to a horizontal position, hitting the hoist clutch, and when it comes up to the top, or approximately fourteen inches, to that stop, it automatically kicks the hoist in neutral, therefore applying a brake on the clutch brake shaft—on the cross hoist shaft, which is yellow, this yellow cross hoist shaft. The brake is orange colored. So when this shaft automatically—when that will hit the lower end of [520] this red shaft it automatically pushes this hoist clutch in neutral, applying this brake, this orange colored brake.

(Testimony of Claude M. Hale.)

Q. Does this machine do that whether you have got a load in it or not?

A. Whether it is loaded or not, if it goes high enough to hit that stop it automatically does it. Ordinarily you can throw—you can kick it in neutral with your hand lever, which is this brown lever here; you can kick it in neutral and apply it the same as it would if it reached the top.

Q. Now when this No. 11 Ross carrier was originally delivered to your company and was called the Ross No. 2, did it have the same form of stop mechanism as you see on those photographs, Exhibits 38-A, 38-B and 38-C?

A. Everything was the same outside of the lower part of this shaft, this red shaft.

The Master: That is, appearing in exhibit what?

(By Mr. Fryer) What is the number of that exhibit?

A. 38-A. The lower part—we changed this frame; it is a much more solid frame, heavier constructed and we changed that a little. In place of having a hole drilled through the shafting with a bolt to hit this lever to automatically push that rod up, I welded an eye on the guide that that screw is connected to and therefore acting the same as it did before but the rod would slide in that guide and when it would come up to the height where it was on the old machine it would automatically kick it out. But otherwise the mechanism is all the same—

(Testimony of Claude M. Hale.)

all the hoist, and the hand control, and the brake, and all the automatic parts are the same, only the little part that we changed down below due to this type of frame.

Q. I show you a photograph with a mechanism colored red on it and ask you to state how that red mechanism on that photograph compares with the No. 2 Ross carrier stop when you first got it. [521]

A. This is the No. 2 Ross Carrier stop in this picture, and——

Q. That is the part colored in red?

A. The part colored in red is the stop that was on there originally, and this red bolt, also red, that goes through that hoist screw, and that screw travels up and down to the load—as the screw would come down this red bolt would hit this lever automatically kicking your hoist *clotch* in neutral and applying the hoist brake; then as it would go up the guide here, which is not colored, is a little white, just below this red arm, when it would come up it would automatically cut the load out. So we welded an eye on.

Q. On to what?

A. To this guide right here (indicating) that ordinarily hit this lever. We welded an eye on that and extended this red lever further down and let it run through that, slide through that, as it would raise and lower. When it would come down we had bolts on—nuts on this rod that were threaded, this

(Testimony of Claude M. Hale.)

red lever here, and whenever the load would go down the same distance it did before it would automatically stop. Then when it would come up, we had a bolt welded onto this rod and whenever this guide would slide up to that it would automatically kick it out. So it didn't change any of the mechanism, only this red rod, the lower part of this red rod.

Mr. Fryer: We now offer in evidence the photograph used by the witness in his answer and ask that it be marked Defendants' Exhibit 55.

The Master: Any objections?

Mr. Geisler: No, your Honor.

(The photograph of Ross Carrier stop colored red was thereupon received in evidence and marked Respondents' Exhibit 55.)

Q. (By Mr. Fryer) How many more Ross Carriers did your company get after these first two that you have told us about?

A. Let's see. I will have to number them. I don't remember offhand. I will tell you in a moment. They bought six more at [522] their Linnton plant and five more at their Prescott plant, which made eleven more altogether.

Q. That makes thirteen in all, with the first two?

A. Yes.

Q. Just roughly will you tell us about what those Ross carriers cost your company apiece?

(Testimony of Claude M. Hale.)

A. Well, I have been told that they were, although I have never seen any bills or any invoices on them I have been told that they were about forty-five hundred dollars for the small machines and about five thousand for the larger ones.

Q. Now did your company ever buy a Willamette-Hyster Lumber carrier? A. Yes.

Q. About what time was the first Willamette-Hyster carrier purchased by your company?

A. The first one purchased was delivered there on March 18th, 1935.

Q. March 18th, 1935. Is that machine still in use at your plant?

A. It was up until about three or four weeks ago.

Q. What did you do with it then?

A. It was delivered to the Ross Carrier Company—to the Willamette-Hyster Company.

Q. Have you inspected it since it has been delivered to the Willamette-Hyster Company?

A. Yes.

Q. When you inspected it was it substantially the same in all its construction as when you were using it? A. Yes.

Q. Has any number been placed on that Willamette-Hyster machine by Clark & Wilson?

A. Yes.

Q. What number is it? A. No. 1. [523]

(Testimony of Claude M. Hale.)

Q. I show you two photographs and ask you to state whether or not you have compared those photographs with Clark & Wilson's No. 1 carrier?

A. Yes.

Q. And will you state whether or not those two photographs truly and correctly show the construction of Clark & Wilson's No. 1 carrier?

A. Yes, they do.

Mr. Fryer: We now offer in evidence the perspective view photograph identified by the witness and ask that it be marked Defendants' Exhibit 56-A. We also offer in evidence the partial side view photograph identified by the witness and ask that that be marked Defendants' Exhibit 56-B.

The Master: Any objection?

Mr. Geisler: No, your Honor.

The Master: They will be received and so marked.

(The perspective view photograph of Clark & Wilson's No. 1 carrier was thereupon received in evidence and marked Respondents' Exhibit 56-A, and the partial side view photograph of Clark & Wilson's No. 1 carrier was received in evidence and marked Respondents' Exhibit 56-B.)

Q. (By Mr. Fryer) Clark & Wilson's No. 1 carrier shown on the photographs you have just identified has upper and lower limit stops for the load lifting means?

(Testimony of Claude M. Hale.)

A. They have—no; their limit stop is in a horizontal position and the first mechanism on this other one is in a vertical position, but then thereafter—the first red lever is in a vertical position; thereafter it is in a horizontal position; but the one on the Willamette-Hyster's carrier is in a horizontal position.

Q. In your answer you were comparing Clark & Wilson's No. 11 Ross carrier with the Willamette carrier; is that right? [524] A. Yes.

Q. The Willamette Carrier automatically stops the upward movement of the load lifting means and the downward movement of the load lifting means whether there is a load in the machine or not, does it? A. Yes.

Q. And has it any brake in it like the brake of Clark & Wilson's Ross carrier?

A. It is a little different design, but it works the same way, because when the hoist is in neutral the brake is automatically applied, which is similar—is the same as on the other machine. When the limit stop—when the stop kicks it into neutral, why, therefore the brake applies. It is just a little different arrangement on the mechanism.

Mr. Fryer: You may cross examine.

Mr. Geisler: No cross examination.

(Witness excused) [525]

Mr. Fryer: Yes. And at this time the defendants offer as one exhibit a copy of each of the prior

art references cited during the prosecution of the application for the Gerlinger patent in suit and ask that that be marked Defendants' Exhibit 57.

(The documents referred to were thereupon received in evidence and marked Respondents' Exhibit 57.)

Mr. Fryer: We will call Mr. Grab.

GUSTAV A. GRAB.

was thereupon produced as a witness in behalf of defendants herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fryer:

The Master: State your name and address.

A. Gustav Adolph Grab, 3724 Northeast Senate Street, Portland, Oregon.

Q. What is your age, Mr. Grab?

A. Fifty years.

Q. And your occupation?

A. I am Manager of the Carrier Department at the Willamette-Hyster Company, in Portland, Oregon.

Q. And that Willamette-Hyster Company is one of the defendants in this case? A. Yes, it is.

Q. About the beginning of the year 1920 what was your occupation?

A. I was manager of a garage in Dallas, Oregon.

Q. Briefly, what were your duties as manager of the garage at that time and place?

(Testimony of Gustav A. Grab.)

A. I was in charge of the repair shop, of sales, and of all duties pertaining to general management of the business.

Q. Will you state whether or not prior to your engagement in [526] that manner at that time you had had any experience with mechanical matters?

A. I had experience with gas engines in general, automobiles, trucks, tractors, for at least fourteen years prior to that time.

Q. What was your next principal employment after your work as manager of the garage in Dallas, Oregon?

A. I became partner and manager in a tractor business in Dallas, Oregon.

Q. And how long were you occupied in that manner? A. About one year.

Q. And thereafter what was your occupation?

A. I accepted employment with the Dallas Machine & Locomotive Works in Dallas, Oregon.

Q. The Dallas Machine & Locomotive Works you refer to is the plaintiff in this case?

A. Yes.

Q. About what date did you go to work for the plaintiff? A. In May, 1921.

Q. And what, briefly, was the nature of your duties with the plaintiff?

A. At first, to start construction and complete the design of a Gerlinger carrier.

(Testimony of Gustav A. Grab.)

Q. When you refer to a Gerlinger carrier do you refer to a product which was then on the market?

A. No.

Q. Was the Dallas Machine & Locomotive Works manufacturing or selling a carrier when you went to work for it in May, 1921?

A. No, it was not.

Q. What relationship, if any, did Mr. Gerlinger have with the plaintiff at the time you went to work for the concern?

A. Mr. Gerlinger was president of the Dallas Machine & Locomotive Works. [527]

Q. For how long a time did you work with the plaintiff?

A. From May, 1921 to about January 1st, 1926.

Q. Now, throughout that period just tell us briefly the nature of the work which you did with the plaintiff corporation.

A. Within a short time after my employ I became Manager of the Carrier Department and I was in charge of manufacture, design and sales of the Gerlinger carrier.

Q. Approximately how long was it after you began working for the plaintiff before a Gerlinger carrier, as you call it, was sold?

A. About five or six months.

Q. Have you now a recollection of the construction and operation of that first Gerlinger carrier sold by the plaintiff at that time?

(Testimony of Gustav A. Grab.)

A. Yes, I have.

Mr. Fryer: May I see Exhibits 44-A, -B and -C, if the Court please.

Q. (By Mr. Fryer) I show you three views of a machine, being Defendants' Exhibits 44-A, -B and -C for identification, and ask you to state how the construction of the machine shown in those exhibits compares with your recollection of the first Gerlinger machine?

A. It is substantially the same.

Mr. Fryer: We now offer in evidence the photographs heretofore marked for identification as Defendants' Exhibits 44-A, 44-B and 44-C.

Mr. Geisler: Do you claim those to be complete in all details, Mr. Fryer?

Mr. Fryer: I think the testimony shows that the machine is substantially identical in its construction with the machine which the witness has said was first sold by the plaintiff corporation in—or first sold and it was the machine that was completed in 1921.

Mr. Geisler: We have no objection. [528]

The Master: They may be received.

(The three photographs heretofore marked for identification Respondents' Exhibits 44-A, 44-B and 44-C were thereupon received in evidence.)

Q. (By Mr. Fryer) Will you briefly state what part of the machine shown on the photographs Ex-

(Testimony of Gustav A. Grab.)

hibits 44-A, -B and -C is indicated by the green color?

A. The green-colored mechanism is the frame.

Q. And will you state briefly what part of the machine is indicated in purple on those photographs, Exhibits 44-A, -B and -C?

A. The purple mechanism is the load-lifting means in these exhibits.

Q. There is also some mechanism in the machine on the photographs Exhibits 44-A, -B and -C which is colored yellow. Will you tell us what that mechanism is, please?

A. The yellow mechanism is the power-transmission means to the load-lifting means.

Q. Briefly, what is included in that power-transmission means in that machine?

A. A reversible clutch and worm gearing and spur gearing, also some levers to connect up to the clutch mechanism.

Q. Now will you look at the photograph Exhibit 44-B and tell us what part of the machine is indicated by the orange-colored mechanism?

A. The orange-colored mechanism on Exhibit 44-B is the automatic brake.

Q. When does that brake function in the operation of the machine as a whole?

A. Whenever the power-transmission means is returned to neutral or inoperative position, either manually or automatically.

(Testimony of Gustav A. Grab.)

Q. Now will you tell us what the brown-colored mechanism on the photographs Exhibits 44-A, -B and -C is and what it does?

A. The brown mechanism is the hand lever for placing the power-transmission means into operative or inoperative position manually, or by hand.

[529]

Q. Will you state whether or not that brown hand lever performs any function during the automatic operation of the clutch?

A. No, it does not.

Q. Now, I notice some portion of the machine on the photographs 44-A, -B and -C indicated or identified by black lines. Will you state what that mechanism is, commencing first with the member lying just below the upper portion of the frame?

A. It is the load-controlled stop or trip.

Q. When you say a load-controlled stop just what do you mean?

A. It is a member which has to be actuated by a load of a certain size and type in the machine or on the load-lifting mechanism.

Q. And when the load having that certain size and type is in the machine and does actuate this load-controlled stop marked with black lines on Exhibit 44-B what does that do in the operation of the machine?

A. When this stop or trip is struck and lifted up by the proper load in the load-lifting mechanism

(Testimony of Gustav A. Grab.)

it automatically draws the power-transmission means to neutral or inoperative position.

Q. Now will you state whether or not that load-controlled trip in the Gerlinger machine of the Exhibits 44-A, -B and -C can perform any function in the operation of the machine if there is no load in the machine? A. No, it cannot.

Q. About how many machines having the construction and operation shown in the photographs Exhibits 44-A, -B and -C were constructed by the plaintiff, Dallas Machine & Locomotive Works, while you were employed by it? A. One.

Q. Do you recall whether or not the plaintiff, while you were employed by it, manufactured any other rack and pinion machines besides this first one you have described having the construction shown on Exhibits 44-A, -B and -C?

A. No, it did not.

Q. Did it make any kind *or* rack and pinion machines besides this [530] first one while you were employed by it? A. Yes, it did.

Q. About how many, as nearly as you can recall?

A. About nine or ten.

Q. How did those nine or ten machines differ from the one shown in the photographs Exhibits 44-A, -B and -C?

A. They had a lift-controlled stop in addition to the load-controlled stop.

(Testimony of Gustav A. Grab.)

Q. And how did that lift-controlled stop which was added to the machine you now refer to operate?

A. The lift-controlled stop would automatically return the power-transmission means to inoperative position whether a load was on the load-lifting means or not.

Q. And why did the plaintiff put that lift-controlled stop on those additional machines besides the load-controlled stop such as is shown on the photographs Exhibits 44-A, -B and -C?

A. The load-controlled stop proved very inefficient. We wrecked the lifting mechanism whenever no load was in the machine or if the load was of such shape and size so as to fail to strike the load-controlled stop before the load-lifting means reached its upper limits.

Q. After the plaintiff had completed the construction of this group of machines you have just described did it make any other lumber carriers while you were working for it?

A. Yes.

Q. What kind of lumber carriers were these?

A. We built hydraulic lift carriers.

Q. While the plaintiff was making hydraulic lift carriers did it also manufacture any other type, or did it manufacture hydraulics exclusively?

A. It manufactured hydraulic lift carriers exclusively.

Q. What kind of carriers was the plaintiff manufacturing and selling at the time that you terminated your connection with it? [531]

(Testimony of Gustav A. Grab.)

A. Hydraulic lift carriers.

Q. Will you state briefly, then, the period of time during which plaintiff was making hydraulic carriers exclusively while you were working for it?

A. From sometime in 1923 to the termination of my employ on January 1st, or about January 1st, 1926.

Q. Will you state whether or not any of those hydraulic carriers manufactured by the plaintiff during that period had an automatic brake such as the orange-colored mechanism shown on the photograph Defendants' Exhibit 44-B?

A. No, they did not.

Q. Will you state whether or not any of those hydraulic carriers contained a load-controlled stop such as the one you have described as contained in the machine shown on the photographs Exhibits 44-A, -B and -C?

A. No, they did not.

Q. Did it contain a lift-controlled stop such as you have described as being contained in the group of nine machines made by the plaintiff?

A. No, it did not.

Q. Have you been connected with the business of manufacturing and selling lumber carriers subsequent to the termination of your employment by the plaintiff?

A. Yes, I have.

Q. Has that been intermittently or continuously?

A. Continuously.

(Testimony of Gustav A. Grab.)

Q. Will you state, if you know, how long after the termination of your employment by the plaintiff that company continued to market hydraulic carriers exclusively? A. About two years.

Q. Did any of those carriers to your knowledge contain any automatic brake or any automatic limit stops for the load-lifting device?

A. No, they did not. [532]

Q. While you were employed by the plaintiff was it or was it not part of your work to promote sales of the carrier which was being marketed by that company? A. Yes, it was.

Q. Will you describe briefly just what you did in that regard?

A. I arranged for advertising, literature and personally called on the trade.

Q. In the course of that work will you state whether or not you made it any part of your business to become acquainted with all of the other carriers on the market? A. Yes, I did.

Q. Speaking generally, now, with respect to your entire experience in the carrier business, will you describe briefly the nature and extent of that experience?

A. We principally called on lumbering operations, and principally in the West Coast territory. In making sales of lumber carriers we always had to contact the management, in most cases the president of the company, and as a whole the market was rather limited for lumber carriers.

(Testimony of Gustav A. Grab.)

Q. Would you say, then, that the list of prospective customers for carriers was a broad one or a narrow one?

A. It was definitely a narrow market.

Q. In your work for the plaintiff will you state whether or not you acquired any knowledge of any competing carriers? A. Yes, I did.

Q. Will you name one of them, please?

A. The Ross carrier.

Q. Who was the manufacturer of that carrier?

A. The Ross Carrier Company, of Bentor Harbor, Michigan.

Q. Do you recall the first carrier made by that concern which you ever saw? A. Yes, I do.

Q. Where did you see that carrier?

A. At the Inman-Poulsen Lumber Company.

[533]

Q. At about what date?

A. In the later part of 1921.

Q. Where was the Inman-Poulsen Company that you refer to located at that time?

A. In Portland, Oregon.

Q. At or about that time did you see any other Ross carriers in and around Portland, Oregon?

A. Yes, I did.

Q. Will you state where, if you please?

A. At the Jones Lumber Company and the Clark & Wilson Lumber Company in Portland, Oregon.

Q. Will you state whether or not the Clark &

(Testimony of Gustav A. Grab.)

Wilson Lumber Company you refer to is one of the defendants in this cause? A. Yes, it is.

Q. Do you recall the approximate date upon which you saw this Ross carrier at the defendant Clark & Wilson's plant?

A. About the middle of 1923.

Q. Have you any present recollection of the construction and operation of the Ross carrier which you saw in possession of the defendant Clark & Wilson Lumber Company at that time?

A. Yes, I have.

Q. How do you happen to recall seeing a Ross carrier at the plant of the Clark & Wilson Lumber Company in 1923?

A. We had sold two hydraulic lift Gerlinger carriers to the Clark & Wilson Lumber Company prior to that time. They were giving a great deal of trouble and I made numerous trips to the Clark & Wilson Lumber Company to service those Gerlinger carriers, and I recall on one of those trips seeing the Ross carriers, very shortly after their arrival at the Clark & Wilson Lumber Company's plant.

Mr. Fryer: May the witness be shown photographs Defendants' Exhibits 38-A, -B, and -C, and ask you to state how the construction of the machine shown in those photographs compares with your recollection of the construction of the Ross carrier [534] which you saw at the plant of the defendant Clark & Wilson Lumber Company in 1923?

(Testimony of Gustav A. Grab.)

A. It is substantially the same.

Q. Do you see any respect in which the machine on those photographs Exhibits 38-A, -B and -C differs from the recollection which you have of the construction of the Ross carrier at Clark & Wilson's in 1923?

A. Yes, there is some difference in the frame structure and there is some difference in construction of a vertical red rod which is part of the stop mechanism.

Q. I now show you a photograph, Defendants' Exhibit 55, and ask you to state how the construction of the red stop mechanism shown on that photograph compares with your recollection of the stop mechanism contained in the Ross carrier seen by you at defendant Clark & Wilson's plant in 1923?

A. It is substantially the same.

Q. On the photographs 38-A, -B and -C a portion of the machine is colored green. Will you state what that part of the mechanism is, please?

A. The green mechanism is the frame.

Q. And will you tell us with respect to the other parts on the photographs Exhibits 38-A, -B and -C which have various colors applied to them what each colored structure is?

A. The purple mechanism is the load-lifting means, the yellow mechanism is the power-transmission means, the orange mechanism is the automatic brake, and the red mechanism is the automatic stop mechanism.

(Testimony of Gustav A. Grab.)

Q. And in your previous testimony you have referred to some stop mechanism as load-controlled and others as lift-controlled. Will you state whether or not this stop mechanism of the Ross carrier is a load-controlled or lift-controlled stop?

A. The red mechanism on the Ross carrier in these three exhibits is a lift-controlled stop.

Q. On the photograph before you, Defendants' Exhibit 38-C, I [535] call your attention to the two yellow circular structures lying between the yellow vertical pipes at each side of the machine and ask you to state what that yellow structure is?

A. That yellow structure on Exhibit 38-C is the reversing clutch mechanism.

Q. What type of clutch is that? Is it a mechanical jaw clutch or friction clutch?

A. It is a friction clutch.

Q. In that same photograph there is a red rod extending from the far side of the machine to that yellow reversing clutch which you have just described. Will you state what if anything movement of that red rod has to do with operation of the yellow reversing clutch?

A. This horizontal red rod showing towards the far side of the machine actuates the reversing clutch mechanism.

Q. And what does the actuation of the reversing clutch mechanism do in the operation of the machine as a whole?

(Testimony of Gustav A. Grab.)

A. This rod returns the clutch to neutral position when it is actuated by the lift controlled stop mechanism of which this red rod is a part.

Q. Now, will you look at the photograph Exhibit 38-B and the vertically disposed red rod appearing on that photograph and state what if anything that red mechanism there has to do with the operation of the red mechanism you have just described on the photograph 38-C?

A. This red vertical rod actuates the horizontal rod I just described through the linkage at its top end.

Q. And what if anything is contained in this Ross machine shown on Exhibit 38-B to actuate that vertically disposed red rod shown on that photograph?

A. When the load-lifting means moves in either direction the red stop lug which is fastened to the red lifting means and is shown just below the green horizontal channel member of the frame strikes—the red stops which are fastened to the vertical [536] rod at the lower end of the rod and on the rod just above the horizontal frame channel member whenever the load-lifting means reaches its upper or lower limits.

Q. And will you state whether or not that operation occurs irrespective of the presence of a load in the load-lifting means? A. Yes, it does.

Q. Now, what relationship, if any, exists between this orange-colored mechanism on the photo-

(Testimony of Gustav A. Grab.)

graph 38-C and the red mechanism which you have just described?

A. The red lift-controlled stop mechanism automatically applies the orange brake mechanism whenever the load-lifting means reaches a predetermined position in either direction, and upon the reaching of this predetermined point it places the power-transmission means into neutral position.

Q. When you saw defendant Clark & Wilson's Ross carrier having the construction which you have just pointed out on the photographs Exhibits 38-A, -B and -C did you or did you not communicate any information concerning that Ross carrier to Mr. Gerlinger?

A. Yes, I immediately called Mr. Gerlinger's attention to this automatic stop control and automatic brake mechanism.

Q. What if anything did Mr. Gerlinger do when you told him that the defendant Clark & Wilson Lumber Company was using this Ross carrier having automatic upper and lower limit stops and brake?

A. Nothing, to my best knowledge.

Q. At about what date, as nearly as you can recall, did you call Mr. Gerlinger's attention to the defendant Clark & Wilson Lumber Company's Ross carrier having these automatic features?

A. Immediately after seeing the Ross carrier at the Clark & Wilson Lumber Company, after its

(Testimony of Gustav A. Grab.)

arrival at the Clark & Wilson plant, about the middle of 1923.

Q. Did you ever subsequently again call Mr. Gerlinger's at- [537] tention to defendant Clark & Wilson's Ross carrier having these automatic features which you have described?

A. Yes, I did repeatedly and on numerous occasions.

Q. Will you state whether or not the nature of your duties with respect to the carrier business of the plaintiff was such that if Mr. Gerlinger had taken any action with respect to this Ross carrier you would have known of that fact?

A. Yes, I would have known about it.

Q. Did you ever acquire any knowledge of any act done by Mr. Gerlinger with respect to defendant Clark & Wilson's Ross carrier which you told him about in 1923?

A. No, I did not.

Q. Will you state whether or not during your employment by the plaintiff you had any occasion to read any of the trade journals pertaining to the business of the plaintiff?

A. Yes, I did.

Q. Will you name some of those trade journals, please?

A. The Timberman and the West Coast Lumberman.

Q. The Timberman which you refer to is a monthly or yearly publication?

A. The Timberman is a monthly publication.

(Testimony of Gustav A. Grab.)

Q. And will you state whether or not during your employ by the plaintiff the monthly issues of *The Timberman* were available at the plant of the plaintiff? A. Yes, they were.

Q. Will you state whether or not any of the products of the plaintiff were advertised in that publication? A. Yes, they were.

Q. How frequently? A. Very frequently.

Q. Did you have anything to do with the placing of advertisements of the products of the plaintiff in *The Timberman*?

A. Yes, to the extent that I was the primary factor in building up these advertisements. [538]

Q. Just what did you do in getting up the advertisements in that manner for *The Timberman*?

A. I arranged for photographs, arranged for the posing of machines and operators for the taking of the photographs, I wrote the stories or the descriptive matter appearing in the advertisements, and built the ads up in general before they were submitted to a regular advertising agency for final publication.

Q. State whether or not in that work you consulted with anyone connected with the plaintiff?

A. Yes, I did.

Q. With whom?

A. I freely consulted with Mr. Gerlinger.

Q. And in consulting with Mr. Gerlinger concerning the ads of the plaintiff which were being

(Testimony of Gustav A. Grab.)

prepared for The Timberman what use, if any, was made of any issues of The Timberman?

A. We carefully looked through the issues for competitive advertisements, or advertisements of competitive carriers.

Q. Did you find any advertisements of competing concerns in The Timbermans so examined by you and Mr. Gerlinger? A. Yes, we did.

Q. Will you name some of them, please?

A. Advertisements by the Ross Carrier Company.

Q. That is the Ross Carrier Company of Benton Harbor, Michigan, that you have previously referred to? A. Yes.

Q. And what did you see in the advertisements of that concern while you and Mr. Gerlinger were examining issues of The Timberman?

A. We saw general descriptions of the Ross carriers, and in one case the mention of automatic stops in the load-lifting mechanism.

Mr. Fryer: May I see Defendants' Exhibit 22, please?

The Master: 22 was that?

Mr. Fryer: 22.

Q. (By Mr. Fryer) I show you Defendants' Exhibit 22, being a [539] page from the December, 1925 issue of The Timberman, and ask you if you recognize in that exhibit any of the Ross Carrier Company advertisements referred to in your answer?

(Testimony of Gustav A. Grab.)

A. Yes, I recognize the ad on page 170.

Q. Will you point out what if anything in that advertisement is the matter which you referred to as indicating the presence of the automatic limit stops in the Ross carrier which you called to Mr. Gerlinger's attention?

A. The paragraph reading as follows: "Hoisting is positive and uniform at all four points of lift. Automatic cutouts are provided to prevent damage by unskilled operators. Load can be lifted a fraction of an inch or more and instantly stopped."

Q. After termination of your employment by the plaintiff what work, if any, did you undertake?

A. I accepted a position with the Willamette Iron & Steel Company of Portland, Oregon.

Q. On about what date?

A. On January 15, 1926.

Q. For how long a time did you work for the corporation known as Willamette Iron & Steel Company?

A. Until about February 15th, 1929.

Q. Generally, what was the character of the work which you did for that corporation throughout those years?

A. I was Manager of the Carrier Department in charge of design, construction, sales of lumber carriers, and in charge of general things pertaining to the management of the department.

Q. After February 15th, 1929 what did you do?

(Testimony of Gustav A. Grab.)

A. I continued in the same capacity with the Willamette-Ersted Company, the name of which was changed to the Willamette-Hyster Company about two years ago, to the present time.

Q. What relationship, if any, existed between the carrier business of Willamette Iron & Steel Company with which you were connected and the carrier business of the Willamette-Ersted Company? [540]

A. The carrier business of the Willamette-Ersted Company was a continuation of the carrier business of the Willamette Iron & Steel Company. The Willamette Iron & Steel Company sold its rights in the carrier business to the Willamette-Ersted Company about February 15, 1929.

Q. Will you state whether or not you had anything to do with the designing of a lumber carrier for the Willamette Iron & Steel Company after you accepted employment with it?

A. Yes, I did.

Q. What did you do in that regard?

A. I designed a carrier for the Willamette Iron & Steel Company in about—the beginning part of September, 1926.

Q. Have you any present recollection of the construction and operation of the carrier which you designed for the Willamette Iron & Steel Company commencing in September of 1926?

A. Yes, I have.

Q. May the witness be shown Exhibits 65-A and -B, please? Will you state how the construction of

(Testimony of Gustav A. Grab.)

the carrier shown on the photographs Exhibits 56-A and -B compares with your recollection of the carrier designed by you for Willamette Iron & Steel Company in 1926?

A. It is substantially the same.

Q. Will you look at Exhibit 52 and state whether or not you recognize the mechanism shown thereon as any part of the carrier shown on the photographs you have just referred to, Exhibits 56-A and 56-B.

A. Yes, I do.

Q. Will you state what you know about the preparation of this chart, Exhibit 52.

A. I arranged for taking the photograph of the mechanism shown in this chart.

Q. And will you state whether or not the photograph so taken was the photograph of actual parts taken out of one of the carriers having the construction of the one which you designed for Willa- [541] mette Iron & Steel?

A. Yes, it was.

Mr. Fryer: We now offer in evidence the chart heretofore marked for identification as Defendants' Exhibit 52.

The Master: Any objection?

Mr. Geisler: No.

The Master: It will be received.

(The chart heretofore marked for identification Respondents' Exhibit 52 was thereupon received in evidence.)

The Master: We will now take five minutes recess.

(Short recess.)

(Testimony of Gustav A. Grab.)

The Master: You may proceed.

Q. (By Mr. Fryer) I show you a photograph marked Defendants' Exhibit 43 for identification and ask you to state whether or not you recognize the machine shown on that photograph?

A. Yes, I do.

Q. Will you state whether or not it is a product manufactured by Willamette-Hyster Company, one of the defendants herein?

A. Yes, it is.

Q. Will you explain if you know how the machine shown on this photograph, Defendants' Exhibit 43 for identification, happens to have one wheel removed?

A. One wheel was removed to allow us to see at a glance the mechanism colored on this photograph.

Mr. Geisler: What is the exhibit?

The Witness: 43.

Q. (By Mr. Fryer) Is there anything else in the machine shown in the photograph, Exhibit 43 for identification, which is different from the normal condition of the machine as used in business?

A. Yes. Several counterweights at the extreme left side of the photograph were removed and the cover covering a reversing clutch mechanism was lifted up also to further facilitate the view of [542] the colored mechanism.

Q. Except for these arrangements in the machine made for the purpose of taking this photograph, will you state whether or not the photograph,

(Testimony of Gustav A. Grab.)

Exhibit 43, is a true and correct representation of the construction and arrangement of parts of the Willamette-Hyster machine shown on that photograph? A. Yes, it is.

Mr. Fryer: We now offer in evidence the photograph heretofore marked for identification and ask that it be marked Defendants' Exhibit 43.

Mr. Geisler: No objection.

(The photograph heretofore marked for identification Respondents' Exhibit 43 was there-upon received in evidence.)

Q. (By Mr. Fryer) Have you any enlargement of the photograph, Defendants' Exhibit 43, which will show the parts of the machine more clearly?

A. Yes, I have.

Q. Will you state whether or not the enlargement which is now placed before you is a true and correct reproduction of the photograph, Exhibit 43, which you have just identified?

A. Yes, it is.

Q. And will you state whether or not the colors which appear on this enlargement are placed in the same manner on the enlargement as they appear on the small photograph, Exhibit 43?

A. Yes, they are.

Mr. Fryer: We now offer in evidence the enlarged photograph of the Defendants' Exhibit 43 and ask that it be marked Defendants' Exhibit 58.

Mr. Geisler: No objection.

(Testimony of Gustav A. Grab.)

The Master: It becomes Respondent's Exhibit 58.

(The enlarged photograph of Respondents' Exhibit 43 heretofore marked for identification Respondents' Exhibit 58 was thereupon received in evidence.) [543]

Q. (By Mr. Fryer) When did the defendant Willamette-Hyster Company first manufacture a carrier as shown on the photograph, Defendants' Exhibit 58? A. Early in 1935.

Q. What, if anything, did you have to do with the designing and development of that Willamette-Hyster carrier shown on the photograph, Defendants' Exhibit 58?

The Master: Pardon me. Is that '35 or '25. I didn't get it.

Mr. Fryer: Oh, '35 is the year.

The Witness: '35.

Mr. Fryer: Will you read the question, Mr. Reporter.

(Last question read.)

A. I designed and developed the machine shown in this exhibit.

Q. Will you state what parts, if any, of the mechanism shown on Exhibit 58 are interchangeable with mechanism contained in Defendant Clark & Wilson's Willamette carrier shown on the photographs, Exhibits 56-A and 56-B?

Mr. Geisler: I object to that question, your Honor. I don't see its materiality. This machine was built in 1935. We admit it is not an infringe-

(Testimony of Gustav A. Grab.)

ment, or intended to be an infringement, of the plaintiff's patent. Of course, if your Honor would like to know its construction we have no objection to that, but we can't see any materiality.

The Master: What do you claim for it?

Mr. Fryer: We have this very definite purpose in this item of proof, your Honor: The machine shown on the photograph, Exhibit 58, is admittedly, and of record, something outside of the patent in suit. In other words, that is in the same position as a prior art patent. It is a construction which is admittedly not within the monopoly of the patent. Now we are going to show by this proof that the accused structure in the defendant's machines is identical with this structure which is said to be outside of the patent and thereby prove that the accused structure does not infringe any more than this structure, which is admittedly outside [544] of the patent, infringes. In other words, it is part of our proof of lack of an infringement. In other words, we are going to have two items of proof of this character in this case. We are going to show first the accused combination is identical with prior art combinations to show there is no infringement, because obviously the prior art cannot infringe. If we are identical with the prior art combination we do not infringe. Secondly, if our accused combination is identical with any other combination which for some other reason does not infringe, again, that is refutation of the charges of infringement. So

(Testimony of Gustav A. Grab.)

by proving the identity of the combination with the combination found in this machine which, as of record, does not infringe, we shall also prove non-infringement, and this evidence is material and relevant to that issue.

Mr. Geisler: When counsel speaks of prior art, of course, your Honor, we are thinking only of the art which was prior to the patent, not an invention following the date of the patent, and so on. I can't connect the two. We admit again that construction there shown does not infringe upon our patent, and at any future time if there is a machine of similar nature as this exhibit, Defendants' Exhibit 58, why, it will be again for your Honor to pass upon it; and I may say in advance now any similar construction we shall not claim to be an infringement upon it.

Mr. Fryer: That is not my point, if your Honor please. I don't know if I make myself clear, but we don't contend that this carrier shown on Exhibit 58 is a machine which was built prior to the making of the Gerlinger patent. We do have this very definite state of facts, though: The record conclusively shows that the machine shown on Exhibit 58 does not contain any combination which infringes the patent in suit. In other words, we can take it that whatever is in that machine is outside of the patent. Now we are going to show that in the machine which is accused to be an infringement the only structure which has any relationship to this suit is a structure

(Testimony of Gustav A. Grab.)

identical [545] in construction, mode of operation and function with the structure contained in this Willamette carrier, which is admittedly outside of the patent. That is a very direct way of proving the lack of identity then between the combination of the patent in suit and the accused combination. That is the sole purpose of using this machine. We are not contending that machine itself was built at this anterior date.

Mr. Geisler: I can't quite follow counsel, but for the purpose of cutting it short I will say to your Honor, accept it subject to the objection and pass on it later.

The Master: Well, in view of the statement of of counsel the objection will be overruled and the testimony will be received. At some subsequent time in the case I shall be glad to have counsel for the complainant reveal to the Master his theory on why this particular construction does not infringe or does not disclose the principles or the elements of the patent in suit. I don't want to take the time now unless counsel desires to do so now. I don't think it is necessary at the present time. I shall be glad to have you discuss that, however, later on. You may answer the question. Do you remember what it is?

The Witness: May I have the question read, your Honor?

The Master: Yes.

(Last question read.)

(Testimony of Gustav A. Grab.)

Q. The reverse clutch mechanism shown in yellow at the extreme left of chart, Exhibit No. 58, with the orange brake mechanism is a part of the reversing clutch mechanism, is interchangeable with the reversing clutch mechanism and the orange brake which is a part of the reversing clutch mechanism shown at the extreme right of Defendants' Exhibit No. 56-B.

Q. (By Mr. Fryer) When you say that the parts on those exhibits you have been referring to are interchangeable, will you state whether or not you mean that you could take the part you refer to out of one machine and place it in the other machine and have it function there just as well as the part originally [546] in that machine?

A. Yes. The parts are exactly the same and interchangeable.

Q. Will you state how the mechanism colored in red on the chart, Exhibit 58, and the red mechanism on the photographs, Exhibits 56-A and 56-B, compare in function?

A. The parts in red on those two exhibits function substantially the same.

Q. And in their respective machines what do these red mechanisms do?

A. They are automatic lift control stops in both machines.

Q. When you say lift control stops do you mean stops which function automatically irrespective of the presence of a load in the machine?

(Testimony of Gustav A. Grab.)

A. Yes.

Q. Will you briefly explain what the purple mechanism is on the chart, Exhibit 58, and how it works in that machine?

A. The purple mechanism at the extreme right of the chart in Exhibit 58 is the load lifting mechanism. It moves up and down in the green vertical guides shown.

Q. What use is made of those two horizontal extending members colored purple at the extreme right of the chart, Exhibit 58?

A. Those purple members at the very extreme end of the chart are the load arms or a form of load platform of the load lifting mechanism.

Q. How are they used in practice?

A. These load arms or platforms are pushed under a load. The load for carriers is ordinarily placed on stands which are some distance above the ground so that the shoes or hooks or platforms may be pushed or drawn under the load.

Q. I show you Defendants' Exhibit 42 for identification and ask you to state whether or not the machine and the load shown in that photograph illustrates the operation which you have just described with the machine shown on Exhibit 58.

A. Yes.

Q. Will you state what you know about the photograph, Defendants' [547] Exhibit 42, in so far as the taking of it is concerned?

(Testimony of Gustav A. Grab.)

A. I arranged for the taking of this photograph.

Q. Were you present when it was taken?

A. Yes.

Q. Is it a true and correct representation of the machine and as it was when the photograph was taken?

A. Yes, it is.

Mr. Fryer: We now offer in evidence the photograph heretofore marked for identification and ask that it be received as Defendants' Exhibit 42.

Mr. Geisler: It is another type of the load lifting device?

Mr. Fryer: It is the same machine, Mr. Geisler.

Mr. Geisler: The same machine? No objection.

The Master: It will be received.

(The photograph hertofore marked for identification Respondents' Exhibit 42 was thereupon received in evidence.)

Q. (By Mr. Fryer) Will you state whether or not the machine shown on the photograph you have just identified, Exhibit 42, is the same machine as the one shown on the chart, Exhibit 58?

A. Yes, it is.

Q. And will you state whether or not the load of lumber as carried by the machine shown in the photograph, Exhibit 42, represents the usual and customary operation of that product of the defendant Willamette-Hyster Company?

A. Yes. This machine was specifically designed for handling lumber along with other materials.

(Testimony of Gustav A. Grab.)

Q. Will you state whether or not the defendant Willamette-Hyster Company advertises to the trade this machine shown on the photograph, Exhibit 42, as one to be used for handling lumber?

A. Yes, we do.

Q. I ask you to look at Defendants' Exhibit 41 for identification and ask you to state whether that is one of the circulars used by the defendant Willamette-Hyster Company in making the [548] type of advertisement you have just referred to.

A. Yes, it is.

Mr. Fryer: We now offer in evidence the circular heretofore marked for identification and ask that it be received as Defendants' Exhibit 41.

Mr. Geisler: No objection.

The Master: It will be received.

(The circular of Willamette-Hyster Company heretofore marked for identification Respondents' Exhibit 41 was thereupon received in evidence.)

Q. (By Mr. Fryer.) What is it in the machine shown on the chart, Exhibit 58, which elevates the purple load lifting device in the manner described by you a moment ago?

A. The power transmission means shown in yellow.

Q. And will you just briefly describe what is comprised in that yellow mechanism which trans-

(Testimony of Gustav A. Grab.)

mits power to the load lifting device?

A. A reversing clutch, which receives its power from a gas engine. The power is transmitted through worm gearing on the far side of the machine and can't be seen, through a cable to the load lifting means. The cable winds on cable drums which are part of the worm gearing mechanism.

Q. Is there any mechanism in that machine on Exhibit 58 for operating the yellow reversing clutch by hand? A. Yes.

Q. Will you point it out, please?

A. The top of the brown hand lever is shown just under the steering wheel and just above the gasoline tank.

Q. What mechanism does that brown hand lever operate to control the clutch in the manner you described a while ago?

A. This hand lever operates the horizontal yellow link or shaft through a cross shaft on which the hand lever is fastened.

Q. I notice that that cross shaft which you have just referred to has a depending member on the end which we see in the photo- [549] graph, Exhibit 58, and with the red mechanism of the photograph apparently connected to the lever at that point. Will you explain what that red linkage connected to that end of the shaft at that point has to do in the operation of the clutch?

A. The red mechanism is the automatic stop mechanism for returning the clutch to neutral posi-

(Testimony of Gustav A. Grab.)

tion automatically when the load lifting means reaches a predetermined position in either direction.

Q. Just briefly will you tell us how that red mechanism works in doing that?

A. A stop on the load lifting mechanism strikes a corresponding stop on the red linkage at the upper limit of the travel of the load lifting means and, through the linkage, draws the clutch to neutral position.

Q. And it draws the clutch to neutral position through what member shown on Exhibit 58?

A. Through the horizontal yellow member to which the horizontal red member is attached at about the center of the chart.

Q. I notice that this horizontal yellow member or rod which you have referred to has orange colored mechanism attached to it near the left hand end of the chart, Exhibit 58. Will you explain what connection, if any, there is between that yellow clutch operating shaft and that orange colored mechanism?

A. The orange colored mechanism is the automatic brake mechanism and is attached to the horizontal yellow shaft at this point and is actuated by the yellow shaft. The point I refer to is the end of the yellow colored structure towards the right side of the chart.

Q. Now just in general, will you state how the operation of this machine shown on Exhibit 58,

(Testimony of Gustav A. Grab.)

which you have just described, compares with the operation of the corresponding parts in the machine shown on the photographs, Defendants' Exhibits 56-A and 56-B? Are they substantially the same or substantially different?

A. It is substantially the same. [550]

Q. Will you tell us how Clark & Wilson's Willamette carrier, shown on the photographs, Defendants' Exhibits 56-A and 56-B, compares in construction and operation with the carrier which you designed for Willamette Iron & Steel Company in 1926?

A. It is substantially the same.

Q. And will you state whether or not Willamette Iron & Steel Company marketed that carrier which you designed for it in 1926?

A. Yes, it did.

Q. How soon after your design of it in 1926 did it do so?

A. We sold the first machine at the end of 1926 and delivered it early in 1927.

Q. And will you state whether or not manufacture and sale of machines having that construction and operation was continuously carried on after that date by Willamette Iron & Steel and its successors?

A. Yes, it was.

Q. Will you also state whether or not Willamette Iron & Steel in any way advertised the machine so designed by you for it in 1926?

A. Yes, it did.

(Testimony of Gustav A. Grab.)

Q. In what way?

A. We placed advertisements in trade publications at regular intervals. We distributed literature and we advertised the machine in direct contact selling.

Q. Will you state whether or not in all this advertising and publicizing of the machine so designed by you in 1926 the various features of the construction of that machine were disclosed and described?

A. Yes, they were.

Q. How much has such advertising and publicizing of that machine and construction been carried on by the Willamette Iron & Steel and its successors in business?

A. Ever since the beginning of 1927.

Q. And just roughly can you tell us approximately how many carriers having the construction and operation of the one designed by you [551] for Willamette Iron & Steel in 1926 have been manufactured and sold since that date?

A. Over three hundred.

Q. I show you Plaintiff's Exhibit 2, a copy of the Gerlinger patent in suit, and ask you to state whether or not you have heretofore read that patent; and, if you have a copy with you, you might refer to it there.

A. Yes, I have.

Q. Do you understand the construction and operation of the machine shown in the drawings of that patent, Exhibit 2?

A. Yes, I do.

(Testimony of Gustav A. Grab.)

Mr. Fryer: Now, if your Honor please, I think that the evidence from here on will be more readily understood and appreciated if we be accorded an opportunity to demonstrate to the Court various machines containing the structures about which we are going to talk. We have a room arranged with the machines in it where they can be operated, and some questions can be addressed to the witness at that point, so that there will be a record of what we say there; and if that procedure can be followed I think it will expedite the evidence as a whole and facilitate an understanding of that evidence. For that reason I would suggest, then, that we might adjourn at this time and convene again a half hour sooner at this show room that we have arranged and continue the hearing in that manner, or we can provide transportation, if your Honor cares to.

The Master: I am perfectly willing to go out there. I think, however, that I understand how the mechanisms work. Upon the question of any difficulties in operation perhaps I haven't been advised by any testimony.

Mr. Fryer: Some of the operations which we purpose to perform on the machines will be reflected in the testimony of the witness and in that way will become a matter of record.

The Master: I think when we adjourn we will adjourn until two [552] o'clock, due to the fact Mr. Geisler has made an appointment with which an earlier meeting would conflict. But I wonder if there are not some matters we can take up now

(Testimony of Gustav A. Grab.)

and use up this time, without destroying the continuity of your case.

(The photostatic enlargement of the drawings of patent in suit heretofore marked for identification Respondents' Exhibit 25 was thereupon received in evidence.)

Mr. Fryer: And Exhibits 39 and 40, which were marked for identification at the request of the defendant, we can relieve your Honor of the custody of. We will not offer those. We will take those back and take those two exhibits out of the record.

The Master: 39 and 40 are withdrawn.

The Master: We will adjourn then until two o'clock.

(Whereupon, at 11:41 o'clock A. M., November 30th, 1936, a recess was taken until 2:00 o'clock P. M., to reconvene at Twenty-eight and Sandy Road.)

Afternoon Session.

2:00 P. M.

The Master: Proceed.

G. A. GRAB

thereupon resumed the stand as a witness in behalf of the defendant herein and further testified as follows:

Direct Examination

By Mr. Fryer (Continued):

Q. Do you find here the machine of the Gerlinger patent previously described in your testi-

(Testimony of Gustav A. Grab.)

mony and shown in the photographs, Defendants' Exhibits 44-A, 44-B and 44-C?

A. Yes, I do.

Q. That is the machine before you with the sign on it, "Elevator of Gerlinger Patent"?

A. Yes, it is. [553]

Q. I notice parts of that machine have been painted different colors. Will you state what correspondence, if any, there is between the colors on that machine and the colors on the photographs, Defendants' Exhibits 44-A, 44-B and 44-C?

A. The colors on the machine correspond with corresponding parts on the photographs colored the same way.

Q. Will you now operate the machine of the Gerlinger patent with a load of lumber in it in a manner to illustrate how the black bar in the machine corresponding to the part 67 of the Gerlinger patent functions to move the clutch to neutral and stop the load lifting means when the load strikes that black bar?

A. Yes. (Witness operates machine.) I have done so.

Q. Mr. Fryer: I will state, your Honor, if there are any of these operations you care to have repeated we will repeat them as we go along, if you will indicate the ones you want repeated.

The Master: There is one question I would like to ask. I note on the downward movement of the load there is an automatic stoppage but in order to

(Testimony of Gustav A. Grab.)

disengage the shoes an additional operation was indicated. Is that entirely manual?

A. No, your Honor. The downward stopping is entirely automatic.

The Master: Well, after the automatic stopping had occurred there seemed to be an additional movement to disengage the shoes from the load. Was that automatic or manual?

A. Automatic. The machine is old and I am afraid to run it too fast or hard, because I am afraid I might break something on it. I can demonstrate that again to your Honor, if you would like to have me.

The Master: Well, I don't know that that is necessary. But the movement that you made was not due to anything except the age of the machine?

A. That is right, your Honor.

Q. (By Mr. Fryer) Now will you arrange the load of lumber in the machine of the Gerlinger patent in a manner to demonstrate whether it can strike the frame of the machine without engaging the black [554] bar corresponding to the bar 67 of the Gerlinger patent? A. Yes.

Q. Just a minute, Mr. Grab. Have you arranged the lumber in that manner? A. Yes.

Q. Will you now elevate the load in the machine until the upper side of the load strikes the under side of the frame of the machine, so that we may observe whether or not the black bar corresponding to 67 of the patent will function in that operation?

(Testimony of Gustav A. Grab.)

A. Yes. (Witness operates machine.) The load is a little too high. (The witness here moved forward the three upper tiers of lumber in the machine.)

The Master: Is it now in neutral?

A. Yes. (Witness operates machine.)

Q. (By Mr. Fryer) In that last operation did anything in the machine automatically move the clutch to neutral position, or were you required to manually move the clutch to neutral position in order to stop the upward movement of the load lifting means?

A. I was obliged to manually move the mechanism to neutral position.

Q. And why was that?

A. Because the load did not strike the automatic load control stop.

Q. That is, it did not strike the stop prior to striking the frame? A. It did not.

Q. About how great a difference is there between the top of the load which struck the frame and the portion of the load which now underlies but does not touch the black bar corresponding to bar 67 of the Gerlinger patent?

A. About five inches.

Q. (By Mr. Fryer) Do you find here defendant Clark & Wilson's Ross carrier shown in the photographs, Defendants' Exhibits 38-A, [555] 38-B and 38-C? A. Yes, I do.

(Testimony of Gustav A. Grab.)

Q. Will you state how the coloring which appears on the various parts of that machine corresponds with the colors on the photographs, Defendants' Exhibits 38-A, 38-B and 38-C?

A. It is the same.

Q. Will you now start the load lifting means of the Clark & Wilson's Ross carrier moving upwardly without any load on it and show the Court what will happen without any further manipulation of the machine?

A. Yes. (Witness operates machine.) I have done so.

Q. I notice that in the operation just performed on the defendant Clark & Wilson's Ross machine the load lifting means reached an upper limit and stopped at that point without any load in the machine. Will you describe briefly how that operation compares with the operations performed by you on the machine of the Gerlinger patent?

A. In the Gerlinger machine it was necessary for a load to strike a load controlling stop to draw the power transmission mechanism to neutral position. In this machine the red stop mechanism drew the load control—the power transmission means to neutral position without a load in it when the load lifting means reached its upper limit.

Q. When you say "this machine", you refer to Clark & Wilson's Ross carrier?

A. Yes, the Clark & Wilson Ross carrier.

(Testimony of Gustav A. Grab.)

Q. Now do you find here the defendant Clark & Wilson's Willamette carrier, shown in the photographs Defendants' Exhibits 56-A and 56-B?

A. Yes.

Q. What relationship is there between the coloring appearing on this machine and the coloring appearing on those photographs, Exhibits 56-A and 56-B?

A. Corresponding parts are colored the same in the machine and in [556] the exhibits referred to.

Q. Now will you operate the defendant Clark & Wilson's Willamette-Hyster carrier without a load in it and start the load lifting means up and let the Court see what will happen without any further manipulation of the machine?

A. Yes. (Witness operates machine.) I have done so.

Q. In that operation was it necessary to manipulate any part of the machine in order to terminate movement of the load lifting means in either direction?

A. No, it was not.

Q. And that operation was made without any load in the machine?

A. Yes, it was.

Q. Do you find here a machine corresponding to the Willamette-Hyster's machine shown on the photographs, Exhibits 42 and 43?

A. Yes, I do.

Q. Will you state how the coloring on that machine compares with the coloring appearing on the photographs 42 and 43?

(Testimony of Gustav A. Grab.)

A. The coloring is the same on corresponding parts of the machine as on the photographs.

Q. Can you operate this machine, such as shown in the photographs, Exhibits 42 and 43, with the load of lumber on the load lifting means and demonstrate what will happen if the load lifting means are started upwardly and no further manipulation of the machine is had?

A. Yes. (Witness operates machine.) I have done so.

Q. Will you state whether or not the presence of the load in the machine of the photographs, Exhibits 42 and 43, had anything to do with the automatic termination of upward movement of the load lifting means? A. It did not.

Q. In other words, in the operation of the machine shown in Exhibits 42 and 43 did you perform any manual operation to terminate upward movement of the travel of the load lifting means? [557]

A. I did not.

Q. Did you perform any manual operation to terminate downward movement of the load lifting means? A. No, I did not.

The Master: Would you mind operating this once again?

The Witness: Yes. (Witness operates machine again.) I have done so.

Q. (By Mr. Fryer) Will you point out in the defendant Clark & Wilson's Willamette carrier where there is located the mechanism which corre-

(Testimony of Gustav A. Grab.)

sponds to the orange colored mechanism in the small machine shown in photographs, Exhibits 42 and 43?

A. At the front end or the near end of the machine you can see it from underneath.

Mr. Fryer: Now, if the Court, please, I will suggest if opposing counsel have any questions that they care to ask with respect to the machines we have no objection to their doing so at this time. If not, why, then we are through with everything that the defendant wishes to present here at this time.

Mr. Geisler: No. The questions we can ask in the cross examination in the regular course.

The Master: Very well, gentlemen. If there is nothing more we will reconvene at the court room.

(Thereupon at 2:32 o'clock P. M. proceedings were adjourned to be resumed at the court room, and at 2:48 o'clock P. M. proceedings were reconvened at the court room, as follows:)

G. A. GRAB

thereupon resumed the stand as a witness in behalf of the defendants herein and further testified as follows:

Direct Examination

By Mr. Fryer (Continued):

The Master: You may proceed.

Mr. Fryer: We now offer a copy of the prior patent to Dingee, No. 414380, and ask that that be

(Testimony of Gustav A. Grab.)

marked Defendants' Exhibit 59; and we will hand the judge a copy for his own use. [558]

The Master: Any objection?

Mr. Geisler: I don't think that was cited as an anticipation patent. It gives the prior art; is that it?

Mr. Fryer: It is not pleaded in the answer as an anticipation.

Mr. Gleisler: And you won't rely on it for that purpose, either?

Mr. Fryer: No; we are relying on it as showing the state of the prior art.

Mr. Geisler: Only.

The Master: It will be received for that purpose. It becomes Respondents' Exhibit 59.

(The patent to Dingee, No. 414380, was thereupon received in evidence and marked Respondents' Exhibit 59.)

Q. (By Mr. Fryer) Have you studied, and do you understand, the machine shown in the drawings and described in the specification of the Dingee patent, Defendants' Exhibit 59? A. Yes.

Q. I show you a chart and ask you to state whether you have compared the drawings appearing on that chart with the drawings on the Dingee patent, Defendants' Exhibit 59. A. I have.

Q. And will you state whether or not Figures 1 and 2 appearing on that chart before you are true and correct copies of Figures 1 and 2 on the drawings of the Dingee patent, Defendants' Exhibit 59?

(Testimony of Gustav A. Grab.)

A. Yes.

Q. Except for the coloring which appears on the chart?

A. Yes, they are.

Q. I call your attention to the language appearing at the right hand side of that chart before you and ask you to state whether you compared that language with any of the documents here in evidence?

A. Yes, I have. [559]

Q. Will you state whether or not it is a copy of anything found in any of those documents; and, if so, what?

A. It is a true copy of claim 4 of the plaintiff's patent, Exhibit No. 2.

Mr. Fryer: We now offer the chart identified by the witness and ask that it be marked Defendants' Exhibit 60.

The Master: Is there any objection?

Mr. Geisler: Well, your Honor, that includes a statement that the plaintiff's claim is connected with that chart. The plaintiff's claim No. 4 has nothing to do with that patent whatsoever. So I object to it being included in that exhibit.

Mr. Fryer: Of course your Honor understands the offer, not professing to say that language is found in the Dingee patent but it is included in this chart for convenience or reference merely, and it is a true copy of what it purports to be.

Mr. Geisler: I ask that the statement of the claim in connection with that patent be excluded, because it simply befogs the matter. It is not a description of that patent whatsoever, your honor.

(Testimony of Gustav A. Grab.)

The Master: Not a description of your patent or that patent?

Mr. Gleisler: It is claim 4 of our patent, which he associates with this prior patent, and it is not described in any of the prior patents, except the mere connection from the witness as he is trying to do.

The Master: Well, with the statement of counsel that the legend on the right hand side of this exhibit, starting with the words "A lumber carrier comprising", and including means a to f, inclusive, are not a part of the description or claims in the Dingee patent.

Mr. Geisler: That is correct, your Honor.

The Master: It will be received.

Mr. Geisler: That is correct, your Honor.

The Master: And it will become Respondents' Exhibit 60. [560]

(The chart showing drawings in re Dingee patent was thereupon received in evidence and marked Respondents' Exhibit 60.)

Mr. Fryer: We now hand your Honor a copy of Exhibit 60 for your own use.

Q. Will you state briefly what kind of mechanism is depicted by the drawings on the chart, Exhibit 60? A. It is an elevator.

Q. In that elevator construction what is the green mechanism shown on the chart?

A. The green mechanism is the frame.

(Testimony of Gustav A. Grab.)

Q. And what is that purple colored arrangement shown on the chart, Exhibit 60?

A. The purple mechanism is the load lifting means.

Q. Now there is some mechanism on the chart which is colored yellow. Will you state what function in the machine that yellow mechanism performs?

A. The yellow mechanism is the power transmission means from a source of power to the load lifting means.

Q. In this Dingee construction shown on the chart, Exhibit 60, what is it that supplies the power for operating the load lifting means?

A. No source of power is shown on the chart. However, the description in the patent, Exhibit No. 59, on page 1, lines 51 to 54, state, "any suitable motive power for imparting motion may be used."

Q. Referring to Figure 2 of the drawings on the chart, Exhibit 60, will you point out what part, if any, in that figure is the one which receives motion from such a source of power as you have described?

A. The yellow reversing clutch mechanism mainly consisting of friction drums, small b-1, small b-2 and small c, receive the power from the source of power.

Q. And what part in that Figure 2 is connected to the source [561] of power, and by what means?

(Testimony of Gustav A. Grab.)

A. The belt pulley, small b, not colored, receives the power from the source of power and transmits it through the shaft on which this belt pulley is keyed and on which the clutch members are also fastened.

Q. Referring to Figure 1 on the Dingee drawings on Exhibit 60, will you indicate how the motion transmitted through the clutch mechanism as you have described is employed to move the purple load lifting means?

A. The reversing clutch mechanism drives the yellow worm gearing consisting of worms small c-1 and worm gear small d-1, which drives a cable drum on which a cable, capital A-3 is wound. This cable passes over the yellow pulleys at the top of the structure and is fastened to the top of the purple load lifting means.

Q. In figure 2 of the Dingee drawings on Exhibit 60 what, if anything, do the parts marked large E-1 and large E-2 do in the operation of the mechanism as a whole?

A. The yellow parts marked capital E-1, capital E-2, are part of the clutch engaging mechanism.

Q. Now I notice in Figure 1 of the Dingee drawings on Exhibit 60 a brown structure marked large F. Will you explain what that mechanism is?

A. The brown structure marked capital F is an endless cable for manually operating the reversing clutch mechanism.

(Testimony of Gustav A. Grab.)

Q. In Figure 2 on Exhibit 60 will you explain how that brown cable for operating the clutch is connected with the clutch for the accomplishment of that function?

A. This brown cable passes through slotted clutch operating lever capital E-4. This lever incidentally, is shown in dotted lines and is fastened to clutch operating shaft, capital E.

The Master: E-4? Oh, I get you.

(Witness indicates on drawing.) [562]

The Master: All right. Go ahead.

The Witness: Lugs are fastened to this cable above and below this lever and are indicated by the letters small f-2.

Q. (By Mr. Fryer) In Figure 1 of Exhibit 60 I notice red members F-1, large F-1 on the brown cable you have described, and a red member A-1 on the purple load lifting means. Will you explain what those red devices are in the Dingee construction?

A. Those red members are the automatic stop members.

Q. What do they do in the operation of the Dingee machine?

A. These red members automatically return the clutch to inoperative position whenever they are actuated by the load lifting means reaching its upper or lower limits.

Q. And just how did they do that?

A. Red arm a when fastened to the top of the load lifting means strikes lug F-1 at the end of its

(Testimony of Gustav A. Grab.)

upward travel, I mean at the end of the upward travel of the load lifting means, and through the medium of the endless cable draws the reversing clutch to neutral position.

Q. On Exhibit 60 I see some orange-colored mechanism designated by the reference character e-4. Will you explain what that device is in the Dingee machine?

A. The orange mechanism e-4 is the automatic brake.

Q. When does that automatic brake function in the operation of the Dingee machine?

A. This brake is automatically applied whenever the power transmission means is returned to in-operative or neutral position, either manually or automatically.

Q. What is it in this Dingee construction which makes that orange-colored brake mechanism operate automatically when the clutch is returned to neutral?

A. The brake lever e-4 is mounted on an orange eccentric e-1. This eccentric is keyed to the clutch operating shaft E and functions whenever the clutch operating shaft is moved. [563]

Q. And I notice that on Exhibit 60 the structure at the extreme left including the part A-2 and two sheaves in the upper portion of the frame have not been colored. Will you explain what that uncolored portion of the Dingee structure on Exhibit 60 is?

(Testimony of Gustav A. Grab.)

A. The structure shown in Figure 1 is a duplex system. The patent Exhibit Number 59 makes it optional to use a single load lifting means, and we have elected to only color this single load lifting means.

Q. Well, I will now ask you to look at that small model on the table near you and ask you to state whether or not you had anything to do with its construction?

A. Yes, I arranged for and directed the making of this model.

Q. Was anything used by you as a guide in the construction of that model?

A. Yes, I used the Dingee patent, Exhibit Number 59, to guide me in the construction of this model.

Q. What can you say, then, as to how the construction and arrangement of the parts in the model and their operation compare with the construction, arrangement and operation of the parts shown in Figures 1 and 2 of the Dingee patent, Exhibit 59?

A. They are substantially the same.

Mr. Fryer: We now offer in evidence the model identified by the witness and ask that it be marked Respondents' Exhibit 61.

The Master: Is there objection?

Mr. Geisler: No, Your Honor.

(The model referred to was thereupon received in evidence and marked Respondents' Exhibit 61.)

(Testimony of Gustav A. Grab.)

Q. (By Mr. Fryer) Will you please explain what relationship, if any, exists between various colors appearing in the Dingee model, Respondents' Exhibit 61, and the colors appearing on the Dingee chart, Respondents' Exhibit 60?

A. The colors on parts on the model correspond with identical [564] parts colored the same in the chart in Exhibit 60.

Q. Is the Dingee model, Respondents' Exhibit 61, capable of operation under its own power?

A. Yes, it is.

Q. And will you state whether or not such operation under its own power is substantially identical with the described operation of the Dingee mechanism shown and described in the Dingee patent?

A. Yes, it is.

Q. I have now started the motor in the Dingee model and I will ask you to operate the manual control for the clutch to illustrate how such means can be employed to initiate movement of the load lifting means in an upward direction.

(The witness here demonstrated with Respondents' Exhibit 61.)

Q. I notice that in the operation just initiated by you the load lifting device colored purple in the Dingee model moved upwardly and then came to a stop without any further manipulation of the model by you. Will you explain what caused that operation?

(Testimony of Gustav A. Grab.)

A. The red arm fastened to the top of the load lifting means automatically engaged the red stop on the brown cable and drew the clutch to neutral position.

Q. Now will you operate the Dingee model so as to initiate downward movement of the load lifting means?

A. Yes. (Witness here demonstrated with Respondents' Exhibit 61.)

Q. I observe that after having initiated downward movement of the purple load lifting means in the Dingee machine by manually operating the brown cable the purple load lifting means came to a stop without further manipulation on your part. Will you state what caused that operation in the model?

A. The red arm fastened to the top of the load lifting means contacted the red stop which is fastened on the brown cable [565] below this arm and automatically drew the clutch to neutral position when the load lifting means reached its lower limit.

Q. And when that occurred what if anything happened to the orange-colored mechanism associated with the yellow friction clutch?

A. The orange brake was automatically applied on the orange flange of the—of a part of the reversing clutch mechanism.

Q. I notice that in its present condition the Dingee model has its motor running and one shaft of the reversing clutch mechanism is rotating while

(Testimony of Gustav A. Grab.)

one of the three friction surfaces is held stationary. Will you state whether or not that is the neutral position of the reversing clutch mechanism?

A. Yes, that is the neutral position of the clutch mechanism.

Q. Is there anything in the condition of that orange-colored mechanism with the clutch in that neutral position which indicates whether or not the orange mechanism is performing any function?

A. The orange mechanism is applied on the stationary clutch member.

Q. And can you tell that in any way by inspection of that orange-colored brake mechanism?

A. Yes, it plainly contacts the clutch member which is stopped.

Q. Now will you initiate movement of the load lifting means again, if you will, and point out how the brake functions when the clutch is removed from neutral position? That is, point out the condition of the brake when the clutch is no longer in neutral.

A. (Witness demonstrating with Respondents' Exhibit 61.) The brake now plainly does not contact this clutch member I mentioned before and the brake is out of engagement.

Q. Will you now explain the function and operation of this yellow-colored shaft extending longitudinally through the frame of the Dingee model and having the forked lever colored yellow extending outwardly and engaging the brown endless cable. [566]

(Testimony of Gustav A. Grab.)

A. When I operate the brown cable I move the yellow shaft—the yellow lever, rather, and thereby turn the shaft, and through the eccentric at the extreme end of the opposite,—at the opposite end to the end to which the lever is fastened replace the clutch into operative position (demonstrating).

Q. That is, the yellow horizontal shaft has at one end two eccentrics, one colored orange for operating the brake and one colored yellow for operating the clutch, is that your understanding?

A. Yes.

Q. And at the opposite end that shaft has a forked lever for engagement by the brown cable so that the shaft may be rocked in the manner you have previously described in the operation of the machine?

A. Yes.

The Master: What was that again please?

(The witness again demonstrated with Respondents' Exhibit 61.)

Mr. Fryer: If Your Honor has any further questions we will be glad to——

The Master: No, I think not.

Mr. Fryer: That will terminate the examination with respect to the model for the time being. From your experience in constructing lumber carriers and lift trucks will you state whether or not it would be a practical thing to utilize the Dingee mechanism shown in the model Respondents' Exhibit 61 in a portable elevator adapted for not only lifting but hauling loads?

(Testimony of Gustav A. Grab.)

A. It would only require a small amount of mechanical skill to mount this device on wheels or on a truck and thereby convert it into a portable elevator.

Q. Why do you say it would require no great amount of mechanical skill to do that? [567]

A. I have seen a number of similar devices mounted on wheels and trucks and have seen them described in a prior patent.

Q. The prior patent you refer to is the patent to Nicholson Number 1340458? A. Yes.

Mr. Geisler: What is that number again, please?

Mr. Fryer: That is Number 1340458, Mr. Geisler.

Mr. Geisler: What is the date of that, please?

Mr. Fryer: May 18th, 1920. We now offer in evidence the patent referred to by the witness and ask that it be marked Respondents' Exhibit 62.

Mr. Geisler: I call to Your Honor's attention, also, that this is merely a prior art patent, not cited as anticipation.

The Master: I understand that to be the fact.

Mr. Fryer: It is not pleaded in the answer in support of the technical defense of anticipation, Your Honor.

The Master: It will be received for that purpose and that purpose only.

(Said patent Number 1340458 to Nicholson was thereupon received in evidence and marked Respondents' Exhibit 62.)

(Testimony of Gustav A. Grab.)

Q. (By Mr. Fryer) Have you studied and do you understand the construction and operation of the mechanism shown in the Nicholson patent, Respondents' Exhibit 62? A. Yes, I do.

Q. I now show you a chart comprising four figures and ask you to state whether or not you have compared those figures on the chart with the drawings of the Nicholson patent, Respondents' Exhibit 62? A. Yes, I have.

Q. And will you state whether or not those figures on the chart before you are true and correct reproductions of the corresponding figures of the Nicholson patent except for the colors appearing on the chart? [568]

A. Yes, they are.

Q. And will you state, also, what that language is which appears in the lower right-hand corner of the chart before you?

A. The language is a copy of claim 4 of the patent in suit.

Mr. Fryer: We now offer in evidence the chart identified by the witness and ask that it be marked Respondents' Exhibit 63.

Mr. Geisler: No objection, except that the recitation that it is claim 4 is not included in the exhibit.

The Master: It is understood from the statement of counsel that the legend appearing upon the exhibit in question is not found in, but is a copy of, the claim 4 of plaintiff's patent. That is correct, is it not?

(Testimony of Gustav A. Grab.)

Mr. Fryer: Let me have that statement again, please.

(The statement by the Master was thereupon read.)

Mr. Fryer: That is correct, Your Honor.

The Master: With that understanding the exhibit will be received.

(The chart referred to was thereupon received in evidence and marked Respondents' Exhibit 63.)

Q. (By Mr. Fryer) Now, briefly, will you state what mechanism shown in the Nicholson machine is represented by each of the various colors which are appearing on the chart Exhibit 63?

A. The green mechanism on the Exhibit 63 is the frame, the purple mechanism is the load lifting means, the yellow mechanism is the power transmission means, the red mechanism is the automatic stop means, and the orange mechanism is the automatic brake.

Q. Will you state whether or not that green frame mechanism of Nicholson on chart Exhibit 63 is capable of standing by itself independently of the brake mechanism which is shown associated with that green frame on the chart?

A. Yes, it is.

Q. How is that accomplished in the Nicholson construction? [569]

A. By unfolding legs number 8 and withdrawing the truck or wheels from under the green frame.

(Testimony of Gustav A. Grab.)

Q. And when the truck or wheels are so withdrawn from beneath the green frame of the Nicholson structure on Exhibit 63 will you state whether the elevator mechanism is capable of operation to raise or lower a load? A. Yes, it is.

Q. Now, in the Nicholson construction after the truck or wheels have been removed from under the green frame will you state how that green frame and the elevator mechanism mounted therein compares in construction and mode of operation with the elevator mechanism found in the Dingee model?

A. It is substantially the same.

Q. I now direct your attention to the Dingee construction as illustrated in the Dingee model and ask you to state how the construction and mode of operation of the reversing clutch of that model compares with that of the friction reversing clutch in the defendant Clark & Wilson's Willamette machine?

A. They are substantially the same, because both are reversing mechanisms.

Q. Referring now to the Dingee model, I will ask you to state how the elevator mechanism contained therein compares with the defendant Clark & Wilson's Willamette carrier inasfar as the means provided for automatically terminating movement of the load lifting means is concerned?

A. They are substantially the same.

Q. Why do you say that?

(Testimony of Gustav A. Grab.)

A. They are both means to stop the power transmission means when the load lifting means reaches a predetermined extent in either direction without a load or with a load.

Q. And how does that Dingee construction compare with the construction in defendant Clark & Wilson's Willamette carrier insofar as the provision of any manual means for operating the clutch is concerned? [570]

A. They are substantially the same.

Q. Why so?

A. Both have means for manually placing the power transmission means into operative or inoperative position.

Q. Will you state whether or not you have any difficulty in coming at that conclusion of substantial identity between those manual means in Dingee and in the Willamette machine in view of the fact that the remote control between the handle and the clutch in the Willamette machine is a system of links and levers, whereas the remote control in the Dingee model is a flexible endless cable?

A. I have not.

Q. Why not?

A. Both are a form of remote control for the same mode of operation and function.

Q. Will you state how the brake mechanism of the defendant Clark & Wilson's Willamette carrier compares with the automatic brake mechanism in the Dingee model which you have pointed out and is

(Testimony of Gustav A. Grab.)

colored orange in that model, insofar as their functions are concerned?

A. They are substantially the same.

Q. And what is your reason for saying that?

A. The brake—the orange brake mechanism in the model, as well as in the Willamette carrier, in the Clark & Wilson Willamette carrier, is automatically applied whenever the power transmission means is returned to neutral position manually or automatically.

Q. Going back now to the Nicholson construction, will you briefly describe——

The Master: Pardon me, may I ask a question here?

Mr. Fryer: Yes, Your Honor.

The Master: Do I understand that in Dingee you can throw the clutch into neutral by manual operation? A. Yes, Your Honor. [571]

Mr. Fryer: Will you perform that demonstration on the Dingee model for the Court, please.

(The witness here made a demonstration with Respondents' Exhibit 61.)

The Master: All right.

Q. (By Mr. Fryer) Going back to the Nicholson construction for a moment, will you briefly explain how the purple load lifting means in that mechanism is arranged for movement in the machine as a whole, using the chart Exhibit 63 for that purpose.

(Testimony of Gustav A. Grab.)

Q. In Exhibit 63 the purple load lifting means or platform is arranged to move up and down in the vertical guides, in the vertical green guides number 3 of the frame.

A. In that Nicholson elevator or carrier what sort of power is employed for operating the hoisting mechanism?

A. An electric motor is shown in the patent Exhibit No. 62. However, it is stated on page 1, lines 76 to 70, "Other types and varieties of power plants which are found suitable may be substituted for that shown."

Q. Briefly, will you describe how the yellow power transmitting means of the Nicholson construction, Exhibit 63, functions to transmit power to the load lifting means and move it up or down in the green frame?

A. The power is transmitted through the reversing mechanism in housing number 23 to worm gearing number 22 and through cable number 51 to the load lifting means. The cable 51 is wound on cable drum number 21, which is driven by the worm drive mechanism number 22.

Q. Will you state whether or not there is anything in the Nicholson patent which shows or describes the particular construction or arrangement of the parts within the casing 23 which controls the transmission of power?

A. The only description is the statement that it is a reversing mechanism, without describing the same, in the box 23.

(Testimony of Gustav A. Grab.)

Q. With respect to the drawings, all that you find, then, is merely that housing with an operating handle extending to it, but nothing to show the internal construction of that mechanism, is that correct? A. Yes.

Q. What is the function of that yellow part 23 in the Nicholson mechanism as a whole, inasfar as the operation of the purple load lifting means is concerned?

A. The mechanism in part 23 is a reversing mechanism to place the power transmission means into operative or inoperative position.

Q. How about controlling the direction of travel of the purple load lifting means?

A. By moving brown handle number 25 into up or down position the direction of travel is controlled thereby, respectively.

The Master: 25 is that handle?

A. Yes, Your Honor.

The Master: Where is it shown there—oh, yes, I guess it.

Q. (By Mr. Fryer) Will you give us a brief description of how the red means in the Nicholson chart functions to automatically stop movement of the load lifting means?

A. A red stop arm number 44 which is fastened to the top of the load lifting means contacts the red lug or stop on the endless cable number 71 when the load lifting means reaches its upper limit of travel. Upon the arm 44 contacting this lug it auto-

(Testimony of Gustav A. Grab.)

matically returns the power transmission means to neutral position.

Q. And how does it do that?

A. The cable,—the endless cable, the red endless cable, [573] number 71, turns red shaft or sleeve number 74, which has a bevel gear attached to one end of it and which actuates a corresponding bevel gear number 76. This corresponding bevel gear number 76 is fastened to reversing mechanism operating shaft number 24, which is shown in red in Figure 1 of the Exhibit 63.

Q. Will you now explain how the orange-colored mechanism in the Nicholson construction shown on Exhibit 63 functions.

A. The orange mechanism is a brake which is automatically applied whenever the power transmission means is returned to neutral position either manually or automatically.

Q. Are the various mechanical parts of that orange-colored automatic brake on Exhibit 63 shown in detail in the Nicholson patent?

A. No, they are not.

Q. Now that you have described the functions of the various parts of the Nicholson construction will you explain very briefly how the machine as a whole is made to operate to perform its intended work?

A. The purple load-lifting means or platform number 41 is pushed under a load, or a load is placed thereon. The operator then moves the brown operating handle number 25 to up position and

(Testimony of Gustav A. Grab.)

thereby through the mechanism in housing number 23 causes the power transmission means to lift the load lifting means in the upward direction. When the load lifting means reaches its upper limit the red automatic stop mechanism heretofore described automatically draws the reversing mechanism to neutral position and thereby stops the hoisting operation and at the same time automatically applies the orange brake. To lower a load the operation is substantially the same in reverse.

Q. In that operation of the Nicholson carrier that you have just described will you state whether or not the presence or absence of a load on the load lifting device had anything to do [574] with the termination of upward or downward movement of the load lifting means? A. No, it did not.

Q. Would you say, then, that the automatic stops contained in this Nicholson device for automatically terminating upward or downward movement of the load lifting means are controlled by the load or controlled by the lift mechanism itself?

A. They are controlled by the lift mechanism and not by the load.

Q. Will you state whether or not in your experience in the carrier business since 1921 you have found that carriers of the general type shown on the Nicholson chart, Respondents' Exhibit 63, have been used in the trade?

A. Yes, I have seen numerous structures of this design in operation in warehouses, terminals and

(Testimony of Gustav A. Grab.)

lumbering operations to handle various types of material, including lumber.

Q. Will you state how the function of the purple load lifting means of the Nicholson patent shown on the chart Exhibit 63 compares with the function of the load lifting means in defendant Clark & Wilson's Willamette carrier?

A. It is substantially the same.

Q. And how does the function of the yellow means on the Nicholson chart Exhibit 63 for transmitting motion from a source of power to the load lifting means compare in function with the means for transmitting motion from the engine to the load lifting means in defendant Clark & Wilson's Willamette carrier?

A. It is also substantially the same.

Q. Likewise, will you state how the respective functions of the automatic stop mechanism in Nicholson compares with that of the automatic stops in defendant Clark & Wilson's Willamette carrier?

A. It is also substantially the same.

Q. And is your answer also the same with respect to the [575] automatic brake in both Nicholson and in defendant's Willamette carrier?

A. Yes, it is.

Q. Now will you point out some of the factors which lead you to state that the functions of these various mechanisms in defendant Clark & Wilson's Willamette carriers are substantially the same as

(Testimony of Gustav A. Grab.)

the functions of the corresponding mechanisms in the Nicholson construction?

A. Both have a frame, a purple load lifting means, a yellow power transmission means which can be placed into operative or inoperative position manually and which can be placed into neutral position automatically. Both have an automatic stop mechanism which functions automatically whenever the load lifting means reaches a predetermined position in either direction, and both have an orange brake which is automatically applied whenever the power transmission means is returned to neutral or inoperative position either manually or automatically.

Q. Do you find any obstacle in arriving at that conclusion in the fact that in the Nicholson mechanism on Exhibit 63 the source of power is indicated in the drawings as an electric motor, whereas the source of power in the Willamette machine is a gasoline engine?

A. No, I do not.

Q. Why not?

A. Because I have seen motors, electric motors or gas motors, used at will in similar devices and both perform the same function.

Q. In your opinion is it or is it not any obstacle to the identity of construction, mode of operation and function which you have found between Nicholson and the Willamette carrier that in Nicholson the red automatic stops comprise an endless cable,

(Testimony of Gustav A. Grab.)

whereas in the defendant Clark & Wilson's carrier those stops are not operated by cable but by links and levers? [576]

A. No, both are a form of remote control performing the same function.

Mr. Fryer: We now offer in evidence a copy of the patent to French and Pavey, Number 1360917, issued on November 30, 1920, and ask that that be marked Respondent's Exhibit Number 64.

Mr. Geisler: That is also one of those patents, if Your Honor please, cited merely as prior art.

The Master: I so understood it to be?

Mr. Fryer: Yes, Your Honor. It is not pleaded in the answer as an anticipation.

(Said copy of Patent 1360917 to French and Pavey was thereupon received in evidence and marked Respondents' Exhibit Number 64.)

Q. (By Mr. Fryer) Have you read and do you understand the patent to French and Pavey, Respondents' Exhibit 64? A. Yes.

Q. Do you understand the construction and operation of the machine shown in that patent?

A. Yes, I do.

Q. And will you look at the chart which is now before you and state whether or not you have heretofore compared the drawings on that chart with Figures 1, 2 and 3 of the drawings of the *Franch* patent Exhibit 64? A. Yes, I have.

(Testimony of Gustav A. Grab.)

Q. And will you state whether or not the figures on that chart are true and correct reproductions of Figures 1, 2 and 3 of the drawings of the French patent, Exhibit 64, except for the coloring on the chart? A. Yes, they are.

Q. And the printed matter appearing on this chart in the lower right-hand corner I assume is again a copy of claim 4 of the [577] Gerlinger patent in suit? A. Yes, it is.

Mr. Fryer: We now offer in evidence the chart of the French et al drawings and ask that it be marked Respondents' Exhibit 65.

Mr. Geisler: Excluding again, Your Honor, the legend giving the claim 4 of the patent in suit.

The Master: With the understanding that the legend is not part of the description or claims of the patent in question, but is a repetition of the claim 4 of the complainant's patent in suit, it will be so received. It becomes Exhibit 65.

(Said chart was thereupon received in evidence and marked Respondents' Exhibit 65.)

Q. (By Mr. Fryer) In the chart of the French patent, Exhibit 65, will you state whether the various colors which appear thereon designate the same kinds of mechanisms which you have heretofore indicated by those same colors? A. Yes.

Q. What kind of a source of power is employed in the form of machine shown in the French patent Exhibit 64?

(Testimony of Gustav A. Grab.)

A. An electric motor is shown, but the description on page 1 of Exhibit 64, line 55 to line 59—or, rather, lines 55 to 57, state, “It may be of any well known construction”, which I assume to indicate that any suitable power may be used.

Q. Will you briefly describe how the purple load lifting means of the French patent is arranged for movement in the green frame on the chart Exhibit 65?

A. The purple load lifting means is arranged to move up and down in the vertical green guide or guides number 21.

Q. In the chart of the French construction, Exhibit 65, how does the yellow-colored means for transmitting motion from the source of power to the load lifting means work, briefly?

A. The electric motor number 9 transmits power to the yellow gearing mechanism. The power to this mechanism is engaged [578] through a reversing mechanism in the housing number 20 and is transmitted to the load lifting means by a cable which is actuated by a drum which in turn is driven by the gearing heretofore mentioned.

Q. Now will you explain for us, briefly, how the red mechanism on the French chart, Exhibit 65, operates for automatically moving the power transmitting means to neutral when the load lifting means reaches a predetermined point in either direction?

(Testimony of Gustav A. Grab.)

A. The red stop mechanism automatically returns the power transmission means to neutral in the following manner: The traveling nut number 54 contacts lugs or collars which are fastened to the main shaft, and upon contacting these collars it rotates the red frame number 53a in Figure 3. The rotation of this frame through sprocket 51a and endless chain number 52 rotates the controller shaft number 49 through the sprocket number 51 and over which the endless chain passes and which sprocket is keyed to the controller shaft.

Q. And when that red mechanism rotates the yellow-controller shaft 49 what does it do to the controlling mechanism? What position does it put it in?

A. It returns the reversing mechanism to neutral or inoperative position.

Q. What effect, if any, has that rotation on the shaft 49 by the red automatic stop mechanism upon the orange colored brake mechanism appearing upon the chart of the French patent, Exhibit 65?

A. Its rotation automatically applies the orange brake whenever the red stop mechanism returns the power transmission means to neutral position, as heretofore described, or if the power transmission means is returned to neutral position manually.

Q. What effect on the operation of the machine as a whole has this automatic application of the orange brake? Or in other words what does apply-

(Testimony of Gustav A. Grab.)

ing the orange brake do to the operation of the machine as a whole?

A. In this case it holds the load in any position in which the power transmission means has stopped the load lifting. [579]

Q. (By Mr. Fryer) Now will you briefly describe how the orange carrier shown on the chart, Exhibit 65, performs its various operations when it is used to do its intended work?

A. When the purple load lifting means is in its lowermost position it is pushed under a load, or a load is placed thereon; the operator then moves the brown handle, number 20-a, to hoisting position and thereby engages through the mechanism in housing, in yellow housing, number 20, the power means to raise the load lifting means. When the load lifting means reaches its uppermost limit the red mechanism actuates through the remote control the control shaft 49 and places it into neutral or inoperative position, thereby stopping the load lifting means, at the same time applying the orange brake mechanism. To lower a load the operation is substantially the same in reverse.

Q. Will you explain a little more fully how travel of the load lifting means to its uppermost position is accompanied by movement of the red stop mechanism to a point where it will return the power controlling device to neutral?

(Testimony of Gustav A. Grab.)

A. The travel nut number 54 travels on the threaded main shaft, which is threaded in time or to coincide with the proper amount of travel of the load lifting means. In other words, when the load lifting means reaches the limit in one direction the nut will have traveled the full distance or the exact distance to engage one of the lugs or stops which actuates the red mechanism.

The Master: May I ask, this traveling nut 54 is not engaged with 53-a, is it?

A. The traveling nut 54 engages 53-a when the lug or the stop collar number 59, which rotates with the main shaft—

The Master: Well, when it does that it turns?

A. It turns the entire controller.

The Master: Turns the entire frame 53-a?

A. Just a small portion of a revolution.

The Master: Yes; I understand. [580]

A. And it transfers that small portion of a revolution to the operating shaft 49 to draw the reversing mechanism into neutral position at the end of this shaft 49.

Q. (By Mr. Fryer) While the nut 54 is traveling along the shaft 33 by reason of the turning of the thread on the shaft inside of the nut, how are the ends of that member 54 moving with respect to the side parts of the frame 53-a?

A. They are moving horizontally.

Q. Sliding along that frame?

(Testimony of Gustav A. Grab.)

A. Sliding along that frame.

Q. That drum 18 in Figure 3 is the drum on which the cable is wound to raise or lower the load lifting means? A. Yes.

Q. And the shaft on which this red stop mechanism is, is also the shaft on which that cable drum is mounted? A. Yes. It is numbered 33.

Mr. Fryer: If your Honor has any further questions I will be glad to have the witness answer them.

The Master: I don't yet follow this drawing so as to understand how, when 53-a makes a partial rotation, it affects the brake mechanism.

Mr. Fryer: I will cover that, your Honor.

Q. When the red endless chain rotates the controller shaft 49, will you explain, by reference to Figure 2 of the French patent, how such rotation of the controller shaft applies the orange colored brake? And in doing that please explain the relationship between the cam on the shaft 49 and the brake actuating rod 46.

A. When the shaft 49 is rotated, as heretofore described, it also rotates cam 48, which is keyed to this shaft. This cam 48 has a low place on it into which the end of the brake shaft drops and allows spring number 50 to push the brake into engaged position.

Q. Is that cam and cam follower on the shaft 46 shown in Figure 2? [581]

The Master: Shaft 46?

Mr. Fryer: Link 46, your Honor (indicating).

(Testimony of Gustav A. Grab.)

The Master: Oh, yes; I see. Let me hear that question again.

(Last question read.)

A. Yes. The cam follower is described as a bearing member on end of rod 47 at this point (indicating).

Q. (By Mr. Fryer): In what kind of lines, dotted or solid lines, are the cam and cam follower shown in Figure 2?

A. They are shown in dotted lines on Figure 2, the cam 48 and the follower 47.

Q. When the low spot on the cam shown in dotted lines in Figure 2 arrives at the position shown in Figure 2, that allows the brake operating rod 46 to move upwardly?

A. Yes, it does.

Q. And that upward movement of that brake operating rod does what to the brake shoes surrounding the brake drum?

A. It applies the brake shoes around the brake drum.

Q. That is, by spring pressure or by what means?

A. By spring pressure. The lower end of spring 50 is seated on a bracket indicated but not numbered.

Q. Now when the cam follower on the end of the brake operating shaft 46 is riding on the high part of the cam shown in dotted lines in Figure 2 mounted on the shaft 49, what happens to the brake?

(Testimony of Gustav A. Grab.)

A. The brake is released as the spring is compressed at that time.

Mr. Fryer: That mechanism is a little difficult in this drawing, your Honor, and if you have any questions that you would like to have the witness' attention particularly directed to I shall be glad to ask them.

The Master: I don't know whether I can direct them. Perhaps I can ask a question here, to see if I understand this.

Mr. Fryer: All right.

The Master: You have spoken of 48, which seems to be a horse- [582] shoe shaped mechanism on the outside of the drive—not the drive shaft but the operating shaft 49, but I take it that the indented portion of the cam you refer to is the dotted line immediately under this shaft 49?

A. Yes.

The Master: But is that any part of 48?

A. No. It is a part of 47.

The Master: 47 is the upper part of 46 which engages in the lowered or indented portion of the cam, isn't it? A. Yes.

The Master: Well, ought that be colored in red, or oughtn't that be in orange?

A. It should be in orange. It is shown in orange here. You see the red sprocket on this side.

The Master: Oh, I see.

A. And the orange is on the other side of the red sprocket.

The Master: All right. Thank you.

(Testimony of Gustav A. Grab.)

A. And therefore it has not been colored.

Q. (By Mr. Fryer): Is it your understanding that the lead line extending from the reference character 48 extends to that horseshoe shaped structure shown in Figure 2 or extends inwardly towards shaft 49 to the dotted periphery of the cam of the shaft 49?

The Witness: I beg your pardon, I didn't follow that question.

Mr. Fryer: May I have the question read, please?

(Last question read.)

A. The reference figure 48 points to the dotted cam.

Q. In the operation of the French carrier which you have described, did the presence or absence of the load on the load lifting device have anything to do with the operation of the automatic stop mechanism which you have described?

A. It does not.

Q. Would you say then that the stop mechanism of the French carrier [583] is a lift control stop mechanism or a load control stop mechanism?

A. It is a lift control mechanism.

Q. How does the function of the yellow means for transmitting motion from the source of power to the load lifting means in the French construction of Exhibit 65 compare with the means in defendant Clark & Wilson's Willamette carrier for transmitting motion from the source of power to the load lifting means?

(Testimony of Gustav A. Grab.)

A. It is substantially the same.

Q. What are the factors which indicate such identity to you?

A. Both are means for transmitting power from a source of power to the load lifting means, and both have mechanisms to be placed into operative or inoperative position manually as well as automatically—manually, and into inoperative position automatically.

Q. In your opinion how does the red automatic stop mechanism on the French carrier shown on Exhibit 65 compare in function with the automatic limit stops in defendant Clark & Wilson's Willamette carrier?

A. It is substantially the same.

Q. And what factors indicate to you such identity in function between those two mechanisms?

A. The red automatic stop mechanism in both devices returns the power transmission means to neutral or inoperative position whenever the load-lifting means reaches a predetermined position in either direction.

Q. And in your opinion does the function of this orange colored brake mechanism of the French patent shown on Exhibit 65 compare with that of the automatic brake on the hoisting mechanism in defendant Clark & Wilson's Willamette carrier?

A. It is substantially the same.

Q. And what factors indicate such identity to you in those two mechanisms?

(Testimony of Gustav A. Grab.)

A. The orange brake mechanism in both devices is automatically applied whenever the power transmitting means is placed into neutral position either manually or automatically. [584]

Q. After that comparison of function of those parts between the defendant Clark & Wilson's Willamette carrier and the machine of the French patent shown on Exhibit 65, what would you say as to the identity or lack of identity between the structure, mode of operation and function of the French carrier as a whole and the Willamette carrier as a whole? A. They are substantially the same.

Q. Is that substantial identity in your opinion affected in any way by the fact that in the drawings of the French patent an electric motor is used in lieu of a gasoline motor, as in the Willamette carrier?

A. It is not. The function and mode of operation would be the same with any suitable power.

Q. Would that identity in construction, mode of operation and function of the two machines as a whole be affected in any way in your opinion by the fact that in the French carrier shown on Exhibit 65 the red automatic stop mechanism is actuated by stops on the main drive shaft, whereas in the Willamette carrier a stop mechanism is actuated by members carried on the load lifting means proper?

A. They are not. Both are mechanical equivalents and perform the same function.

(Testimony of Gustav A. Grab.)

Q. Will you state whether or not in your experience in the carrier business since 1921 you have seen used in industry carriers having substantially the same construction and mode of operation and function as the carrier shown in the French patent and illustrated on the chart, Exhibit 65?

A. Yes. I have seen numerous similar devices being used for elevating and carrying loads from place to place on the same floor. I have seen them pick up a load on one floor and place the load onto a higher floor, and I have seen them in various operations handling all types of materials, including lumber.

Q. And do I understand your testimony correctly to be that you [585] have seen in use in one locality solely for elevating between two different levels in one spot? A. Yes, I have.

Mr. Fryer: I now offer in evidence the Towson & Cochran patent, No. 1,337,804, issued April 20th, 1920, and ask that that be marked Respondents' Exhibit 66.

The Master: Is that a cited patent?

Mr. Geisler: Yes, your Honor. No objection.

The Master: It will be received as Respondents' Exhibit 66.

(Said patent No. 1,337,804 issued to Towson & Cochran was thereupon received in evidence and marked Respondents' Exhibit 66.)

Q. (By Mr. Fryer): Have you heretofore studied the Towson patent, Respondents' Exhibit

(Testimony of Gustav A. Grab.)

66? A. Yes, I have.

Q. And do you understand the construction and operation of the mechanism shown in the drawings and described in the specification of that patent?

A. Yes, I do.

Q. Will you look at the chart which is now placed before you and state whether you have compared Figures 1, 5 and 6 appearing on that chart with the similarly numbered Figures of the Towson patent, Respondents' Exhibit 66?

A. Yes, I have.

Q. And will you state whether or not those Figures 1, 5 and 6 on that chart are true and correct reproductions of Figures 1, 5 and 6 of the Towson patent, Exhibit 66, except for the coloring appearing on the chart?

A. Yes, they are.

Q. And the language appearing in the lower right hand corner of that chart I assume is again a copy of claim 4 of the Gerlinger patent in suit?

A. Yes, it is.

Mr. Fryer: We now offer in evidence the chart of the Towson [586] drawings and ask that it be marked Respondents' Exhibit 67.

Mr. Geisler: No objection, except I move the exclusion of the legend.

The Master: Well, upon the statement of counsel, with that understanding it will be received. It becomes Respondents' Exhibit 67.

(The chart of the Towson patent drawings referred to was thereupon received in evidence and marked Respondents' Exhibit 67.)

(Testimony of Gustav A. Grab.)

Q. (By Mr. Fryer): Will you state whether or not the various colors used on the chart, Exhibit 67, of the Towson patent, indicate the same mechanisms in the carrier shown on the chart as have been indicated by those same colors in the previous exhibits? A. Yes.

Q. Will you explain briefly how the purple load lifting means of the Towson carrier is mounted for operation in the green frame of the Towson machine?

A. The purple load lifting means is mounted in the green frame at points 26 and 31.

Q. And how is the portion of this load lifting device which carries the load moved upwardly or downwardly by means of that pivotal mounting?

A. The purple horizontal platform or load carrying platform is moved up and down by the changing of the position of the vertical toggle mechanism from full lines to dotted lines, or vice versa.

Q. That is, when the toggle links 34 and 40 are moved so as to approach a straight line the load lifting means is raised? A. Yes.

Q. And then those toggles are allowed to form an angle with each other the load lifting means is lowered; is that correct? A. Yes, that is correct.

Q. Now I understand the yellow colored means for transmitting power is the mechanism in Towson which produces this raising and lowering of the purple load lifting means? [587] A. Yes, it is.

Q. Will you explain briefly how the yellow mechanism in Towson operates to raise or lower the

(Testimony of Gustav A. Grab.)

purple load lifting means?

A. The yellow push and pull rod number 48, which is drawn in and out of yellow housing number 60 and has a screw and nut mechanism at the end which is in the housing, actuates the purple toggle mechanism from full line position to dotted line position, or vice versa.

Q. Will you now explain how the red mechanism on the chart, Exhibit 67, functions in the operation of the Towson carrier?

A. The red mechanism automatically returns the power transmission means to neutral position whenever the load lifting means reaches its upper or lower limits.

Q. What form of power transmission means is shown in this Towson patent for raising or lowering load lifting means?

Mr. Fryer: Well, strike that question and put it this way:

Q. Will you point out in the chart, Exhibit 67, what mechanism is employed in the Towson machine for transmitting upward motion to the load lifting means or downward motion, or for placing the power transmitting means in neutral?

A. A reversing mechanism shown in Figure 6 and colored in yellow.

Q. Is that mechanism which you have pointed out capable of being placed in position to move the load lifting means either upwardly or downwardly?

A. Yes.

Q. And is it also capable of being placed in po-

(Testimony of Gustav A. Grab.)

sition so as to be in neutral and not transmit any power to the load lifting means? A. Yes.

Q. Now will you explain briefly what is provided in the Towson structure for operating that power transmitting means both manually and automatically?

A. The brown handle number 87, which is on the end of brown lever 86, is for manually operating this reversing mechanism. The red [588] stop mechanism automatically operates this yellow reversing mechanism whenever it is actuated by the load lifting means at its upper and lower limits.

Q. Now just briefly describe how that red mechanism of Towson does that work.

A. Whenever the load lifting means reaches either the upper or lower limit stops 93 and 94, which are fastened to horizontal red rod number 92, strike the red sleeve on bell crank lever number 85, which actuates the yellow reversing mechanism.

Q. Do I correctly understand, then, that the rod 92 slides back and forth through the part 91 attached to the bell crank lever 85 until one of the stops 93 or 94 strikes 91?

A. Yes, that is right.

Q. Briefly describe the means for automatically applying the brake to the transmitting means whenever this power controlling device is placed in neutral, found in the Towson carrier.

A. The automatic brake in this device is a magnetic brake shown in orange and numbered 100. This brake works on the well known magnetic prin-

(Testimony of Gustav A. Grab.)

ciple, which is automatically applied whenever the current discontinues to pass through it.

Q. Does the Towson patent show the internal construction of that magnetic brake 100?

A. It does not. It refers to a brake which was fully described in a former patent, and this reference is on page 1 of Exhibit 66, lines about 60 to 64.

Mr. Fryer: We now offer in evidence the patent referred to by the witness, it being the Cochran patent, No. 1,260,145, issued March 19th, 1918, and ask that that be marked Respondents' Exhibit 68.

Mr. Geisler: That is not cited in the answer, your Honor, so it is merely prior art.

Mr. Fryer: No; it is more than that, if your Honor please. It is listed in and forms a part of the disclosure of the Towson [589] patent already in evidence, and the purpose of offering it is merely to show the details of the construction and arrangement of brake 100, forming a part of the Towson disclosure.

Mr. Geisler: I haven't seen this. I paid no attention to it, since it wasn't cited, because sometimes a number of patents are cited in one patent, but unless they are specifically referred to as anticipating I don't think we are required to go out and make research. I don't know anything about it. It may be a mere detail, as counsel says.

The Master: I understand it is only offered as being a patent disclosure detail of the magnetic brake referred to in the Towson patent.

Mr. Fryer: Exactly. It is to complete the dis-

(Testimony of Gustav A. Grab.)

closure of the Towson patent, which has been pleaded.

The Master: Yes; and for that purpose it will be received. That becomes Exhibit 68.

(The patent No. 1,260,145 issued to Cochran was thereupon received in evidence and marked Respondents' Exhibit 68.)

Q. (By Mr. Fryer): Will you now briefly describe how the Towson carrier as a whole operates when it is used to perform its intended work?

A. The purple load lifting means is pushed under a load. The operator then moves brown handle number 87 to hoisting position, thereby actuating the reversing mechanism and starting the motor 67, which transmits power to the yellow power transmission means and draws the toggle mechanism into the dotted line position and thereby raising the load lifting means. When the load lifting means reaches its upper limit it automatically draws the reversing mechanism to neutral position thru the red automatic stop mechanism at the same time automatically applying the orange brake number 100. To lower the load or the load lifting mechanism the operation is substantially the same in reverse.

Q. In the Towson patent what is one of the particular uses which [590] the patentee states this carrier of his can be employed to perform?

A. This particular truck apparently was designed, as is stated in the patent, for charging furnaces, which experience has taught me is to charge

(Testimony of Gustav A. Grab.)

annealing ovens or furnaces.

Q. In your experience in the carrier business have you had occasion to manufacture or sell such furnace charging carriers or lift trucks?

A. I have been called upon to quote and I have quoted prices on our small Hyster carrier for doing the same work as described in this patent.

Q. When you refer to your small Hyster carrier, do you mean the lift truck shown on the photographs, Exhibits 42 and 43? And may the witness be shown those exhibits, please?

A. I have them here.

Q. Very well.

A. Yes. I refer to the trucks, or the truck shown in those two exhibits.

Q. From your experience in the carrier business will you state whether or not trucks having substantially the construction and operation of the carrier shown on the Towson chart, Exhibit 67, have been used in actual operation?

A. Yes, they have.

Q. What is your opinion with respect to the identity or lack of identity between the function of the load lifting means of the Towson carrier and the load lifting means in the Willamette Carrier?

A. They are substantially the same.

Q. What factors indicate that substantial identity to you?

A. Both have a frame; both have a load lifting means contained therein; both have a power transmission means to transmit power from a source of power to the load lifting means; both have mechan-

(Testimony of Gustav A. Grab.)

ism to place the power transmission means into operative or inoperative position manually, and to place the power trans- [591] mission means into inoperative position automatically and to automatically apply a brake whenever the load lifting means has reached a predetermined position in either direction and has automatically returned the power transmission means to neutral position.

Q. Now what can you say with respect to the similarity of form between the red automatic stops of the Towson carrier and the red automatic stops of the Willamette carrier as shown on the chart, Exhibit 52?

A. They are both substantially the same.

Q. What features of similarity lead you to that conclusion?

A. Both are a mechanism consisting of links and levers; both are in a horizontal position; and both have two stops, one a horizontal link and the horizontal link slides through another stop member.

Q. In your opinion would the fact that the power transmitting means of the Towson carrier comprises a like reversing switch detract in any way from the substantial identity that you find between the Towson carrier and the Willamette carrier?

A. No, it does not.

Q. Why not?

A. Because both are means to put the power transmission means in and out of operation and both are a reversing mechanism.

(Testimony of Gustav A. Grab.)

Q. Is the substantial identity which you find between the construction and mode of operation of the Willamette carrier and the Towson carrier affected or not affected by the fact that in the Towson mechanism a magnetic brake is automatically applied when the mechanism is placed in neutral, whereas a friction brake is employed in the Willamette carrier operated by other than magnetic means?

A. It is not. Both are a mechanical equivalent.

Q. Mr. Fryer: Shall we commence another subject, your Honor, or proceed?

The Master: I think we will proceed here for a moment or so. [592] I have got to wait until some other people come in anyway on another matter.

Mr. Fryer: We now offer in evidence a copy of the patent to Carr, No. 1,407,124, granted February 21st, 1922, and ask that it be marked Respondents' Exhibit 67.

(The patent No. 1,407,124 to Carr so offered was thereupon received in evidence and marked Respondents' Exhibit 69.)

Q. Have you heretofore studied the Carr patent, Respondents' Exhibit 69? A. Yes, I have.

Q. Do you understand the construction and operation of the carrier mechanism shown therein?

A. Yes, I do.

Q. Will you look at the chart which has been placed before you and state whether you have compared Figure 1 and Figure 8 appearing upon that

(Testimony of Gustav A. Grab.)

chart with Figures 1 and 8 of the Carr patent, Exhibit 69? A. Yes, I have.

Q. Are those Figures 1 and 8 on the chart true and correct reproductions of the corresponding figures of the Carr patent, Exhibit 69, except for the colors on the chart? A. Yes, they are.

Q. And the language in the lower right hand corner of the chart I understand is, again, a copy of the claim 4 of the patent in suit?

A. Yes, it is.

Mr. Fryer: We now offer in evidence the chart identified by the witness and ask that it be marked Respondents' Exhibit 70.

Mr. Geisler: No objection, except to that legend.

The Master: Is the Carr a cited patent?

Mr. Fryer: Yes, your Honor.

Mr. Geisler: Yes. The legend on the chart is what my objection goes to. [593]

The Master: I understand that part is objected to.

Mr. Geisler: Yes, your Honor.

The Master: Upon the statement of the witness as to what has been added to the enlargement, it will be received.

(The chart containing Figures 1 and 8 of the Carr patent was thereupon received in evidence and marked Respondents' Exhibit 70.)

Q. (By Mr. Fryer): Will you state whether or not the color scheme on the chart, Exhibit 70, is

(Testimony of Gustav A. Grab.)

the same as that heretofore explained by you with respect to the previous prior structures?

A. Yes, it is.

Q. In this Carr machine how is the purple load lifting means arranged for movement in the green frame?

A. The purple load lifting means is arranged to move up and down in the green upright guides, numbered 24.

Q. What is used in this carrier as the means for moving the purple load lifting device up and down? That is, is it a cable or some other device?

A. It is a screw and nut mechanism.

Q. Will you describe briefly what mechanism is provided in the Carr machine for transmitting motion from the source of power to the load lifting means in either direction?

A. It is a screw and nut mechanism not described in this drawing.

Q. When you say "this drawing", you refer to——

A. In figure No. 1, on Exhibit 70.

Q. Well then, describe briefly for us the mechanism shown in yellow on the chart Exhibit 70, and explain how it works.

A. The mechanism shown in yellow is the means to place the power transmission means into operative or inoperative position. [594]

Q. In the drawings of the Carr patent is anything more indicated than the mere exterior of this

(Testimony of Gustav A. Grab.)

means which you have just described for doing that?

A. No. The reversing mechanism is simply indicated as a yellow box, called the control box number 69.

Q. Is there any handle extending out of that control box for operating whatever mechanism may be in there? A. Yes.

Q. What is that handle number?

A. The brown handle, number 86, is the handle for operating the control or reversing mechanism in the box 69.

Q. And how does the movement of the handle 86 transmit the necessary motion to operate whatever mechanism is contained inside the box 69?

A. Through the brown link 88 and the yellow return link number 72.

Q. Now will you briefly describe how the red mechanism shown on the chart, Exhibit 70, functions in the operation of the Carr machine?

A. The red mechanism indicated by numbers 104 and 105 and 106 automatically returns the power transmission means to neutral when these red stops are actuated by the load lifting means at its upper and lower limits of travel in the green upright frame.

Q. Will you tell us a little more in detail just how that operation is carried out?

A. In the up motion the top roller number 49 shown in purple, and which is a part of the load lifting platform or carriage, contacts red stop 104

(Testimony of Gustav A. Grab.)

and draws the reversing means or the controlling means to neutral through the yellow linkage which leads to the controller box number 69. In the lowering operation the same roller 49 strikes the red stop mechanism number 105 and 106 at the lowermost position of its travel and also draws the controller mechanism to neutral position through the yellow linkage as heretofore described. [595]

Q. Will you similarly describe the construction and operation of the orange colored brake shown in the Carr drawings on Exhibit 70?

A. The orange brake is automatically applied whenever the reversing mechanism or controller mechanism is returned to neutral either manually or automatically.

Q. And in just a little more detail tell us how that happens in the operation of the Carr machine.

A. The yellow linkage mechanism which is actuated manually as well as automatically is fastened at its lowermost end to a brake actuating lever number 79. This lever has a cam which opens and closes the brake band at its respective positions to apply or release the brake.

Q. Now give us a brief general description of how this Carr carrier operates when it is employed to do its intended work.

A. The purple load lifting means is pushed under a load or a load is placed thereon. The operator then places brown operating handle number 86 into up position, thereby operating the control mechan-

(Testimony of Gustav A. Grab.)

ism in the box 69 and setting the power transmission means into motion to raise the load lifting means. When the load lifting means reaches its upper limit the roller 49 on the load lifting means contacts the red stop and thereby draws the power transmission means to neutral position and stops the lift. At the same time it automatically applies the orange brake. To lower a load the operation is the same in reverse. [596]

Q. (By Mr. Fryer): How do the yellow mechanisms of the Carr and Willamette elevators compare insofar as their respective functions are concerned?

A. They are substantially the same.

Q. What factors indicate such identity to you?

A. Both are means for transmitting the power from a source of power to the load lifting means, and both can be put into operative or inoperative position manually and into inoperative position automatically.

Q. In the Carr and in the Willamette elevators how do the functions of the red stop mechanisms compare with each other?

A. The function of the red mechanisms in the two structures is substantially the same.

Q. And will you likewise compare the respective functions of the orange-colored mechanisms in the Carr and in the Willamette elevators?

A. The function of the orange mechanism is also substantially the same in both structures.

(Testimony of Gustav A. Grab.)

Q. In view of the comparisons which you have made between the respective functions of the correspondingly colored elements in the Carr and Willamette elevators, will you state how the Carr and Willamette machines as a whole compare with respect to their construction, mode of operation and function? A. They are substantially identical.

Q. Will you state whether or not in the operation of the Carr machine the presence or absence of a load in the load lifting device in any way affects the operation of the mechanism?

A. No, it does not.

Q. In your experience in the carrier business have you ever seen in practical commercial operation elevators such as is shown in the Carr patent?

A. Yes, I have seen similar structures on numerous occasions handling materials, elevating them, carrying them from place to place, and including lumber. [597]

Q. Referring now to the Chart Respondents' Exhibit 25, will you state briefly what each of the various mechanisms on that chart is, and in making that explanation refer to the color of each mechanism you refer to.

A. The green-colored parts are the frame. The yellow-colored parts are the means for transmitting power from the source of power to the load lifting means. The purple parts are the load lifting means. The red parts are the means for automatically returning the power transmission means to neutral

(Testimony of Gustav A. Grab.)

position when the load lifting means reaches a predetermined position in either direction. The black color—I should like to correct my last statement. I do not see any red means on the drawings. I meant to refer to the black-colored structures in place of the red. The black-colored structure or structures are the means to return the power transmission means to neutral position when the load lifting means reaches a predetermined position in the up motion. The orange structure is the automatic brake means which is automatically applied whenever the power transmission means is returned to neutral automatically or manually.

Q. What is that large blue rectangular structure in Figure 1 of the chart Exhibit 25?

A. The blue structure is the load on the load lifting means.

Q. In the operation of the Gerlinger machine shown on the chart Exhibit 25 is it your understanding that upward movement of the load lifting means without a load, such as the blue load shown on the chart, will in any way affect the operation of the black bar 67?

A. A load like the blue load will strike the black part 67 on its up motion, lift this part 67, and thereby draw the power transmission means to neutral position.

Q. In the machine of the Gerlinger patent shown on the chart Exhibit 25 will such an operation as you have just described [598] occur if there is no

(Testimony of Gustav A. Grab.)

load in the machine but the load lifting means is started moving upwardly?

A. No, it will not occur.

Q. Upward movement of the load lifting means in the Gerlinger structure will or will not actuate the black bar 67 when no load is in the machine?

A. No, it will not.

Q. In the operation of the machine of the Gerlinger patent as shown on Exhibit 25 what will happen if the load instead of being of the dimensions shown in Figure 1 is a load, say, having only one-third the height of that load?

A. The power transmission means will continue to operate in the up motion until it is placed into neutral position manually or until the mechanism wrecks itself or kills the power by reaching a dead upper limit.

Q. Will you state whether or not you find in the drawings of the Gerlinger machine on Exhibit 25 automatic means for moving the clutch to neutral position upon movement of the load lifting means to a predetermined extent in upward direction?

A. No, I do not.

Q. What is it that indicates the absence of such a means in the Gerlinger drawings?

A. There is no means whatsoever shown. The only automatic means shown for stopping the upward motion is the black bar 67 which has to be contacted by the load, as plainly shown in Figure 1, to perform the function of stopping the lifting mechanism in the upward direction.

(Testimony of Gustav A. Grab.)

Q. Now, will you look at the photographs Respondents' Exhibits 44-A, -B and -C, showing the machine of the Gerlinger patent which was demonstrated to the Court, and state how the construction, mode of operation and function of the parts of the Gerlinger chart Exhibit 25 compare with that of the correspondingly colored parts on the photographs Exhibits 44-A, -B and -C? [599]

A. It is substantially the same.

Q. I notice that on the photographs Exhibits 44-A, -B and -C some of the parts are marked with dotted lines rather than solid black, and I ask you to state whether or not I am correct in assuming that those dotted black lines on the photographs are intended to correspond with the solid black portions shown on the chart Exhibit 25?

A. Yes, they are. They were colored in dotted lines on the photographs in place of solid black so as to not entirely cover the photographed parts and to still keep them so that they can be recognized.

Q. Is there any respect in which you find that the particular form of the various parts of the Gerlinger patent as shown on the chart Exhibit 25 varies from the mechanism as found in the Gerlinger machine demonstrated to the Court and shown in the photographs Exhibits 44-A, -B and -C?

A. It is substantially the same.

Q. Now, will you look at the photographs Exhibits 38-A, -B and -C, showing the defendant Clark & Wilson's Ross carrier, and state whether or not you find in that machine the combination of parts

(Testimony of Gustav A. Grab.)

described in the language on the chart Exhibit 25, insofar as the mere language of that writing is concerned? A. Yes, I do.

Q. Will you state how the presence of those parts enumerated in printing on Exhibit 25 is indicated in defendant Clark & Wilson's Ross machine shown on the photographs Exhibits 38-A -B and -C?

A. Colors underlining the language are the same as colors which correspond—as colors and parts which correspond with the language.

Q. Now, will you state whether or not, in your opinion, from your understanding of defendant Clark & Wilson's Ross carrier, that machine has substantially the same mode of operation as [600] the machine shown in the Gerlinger patent?

A. It has not.

Q. Why not?

A. The Gerlinger structure as shown on the chart has a load-controlled stop only, while Clark & Wilson Willamette-Hyster structure has a lift-controlled stop.

Q. Will you state whether or not defendant Clark & Wilson's Ross carrier has the same or a different mode of operation from the mode of operation of the machine of the Gerlinger patent?

A. The Clark & Wilson's Ross carrier has a different mode of operation than the structure shown on the Gerlinger patent drawings.

Q. And what is the reason for that difference in mode of operation which you find, or what causes it?

(Testimony of Gustav A. Grab.)

A. The Clark & Wilson Ross carrier has a lift-controlled stop, which is absent in the Gerlinger structure, and, as shown by the drawings, the Gerlinger has a load-controlled stop only.

Q. As far as the mere language is concerned, will you state whether or not you find the combination of parts described in the language on the chart Exhibit 60 in the mechanism of the Dingee patent shown on that chart? A. Yes, I do.

Q. How is the presence of that combination of parts described in the language on the chart Exhibit 60 indicated in the drawings of the Dingee patent shown on Exhibit 60?

A. Colors underlining the language are the same as corresponding charts colored the same on the drawing of the chart.

Q. Now, will you state whether or not the various mechanism as shown in color on the representations of the Willamette carrier in evidence are the use or appropriation of a combination of parts found in the Gerlinger patent, or whether such colored parts of the Willamette carrier are the use of a combination [601] of parts which you find, for instance, in the Dingee patent?

A. They are an appropriation of the parts as shown in the Dingee patent and not as shown in the Gerlinger patent.

Q. What makes you say that?

A. Both Willamette and Dingee have a lift-controlled stop, while Gerlinger has a load-controlled stop.

(Testimony of Gustav A. Grab.)

Q. Will you state whether or not the mode of operation of the colored parts in the Willamette carrier is the mode of operation found in the Dingee patent or the mode of operation found in the Gerlinger patent?

A. It is the mode of operation found in the Dingee patent and not in the Gerlinger patent.

Q. And the characteristic difference in the mode of operation which you refer to I assume has to do with the way in which the movement of the load lifting means is automatically controlled?

A. Yes.

Q. As far as the mere language is concerned, will you state whether or not the combination of parts described in the printing on the chart Exhibit 63 is found in the Nicholson mechanism shown on that chart?

A. Yes, it is.

Q. And in this case, also, is the presence of those enumerated parts in the printing on Exhibit 63 indicated by identity of colors?

A. Yes.

Q. Referring to the colored parts of the Willamette carrier as shown on the various exhibits here, will you state whether or not that combination of colored mechanisms of the Willamette carrier is an employment of a combination of parts found in the Gerlinger patent or an employment of a combination of parts found in the Nicholson patent? [602]

A. The combination of colored mechanisms in Willamette is an appropriation of Nicholson and not of Gerlinger.

(Testimony of Gustav A. Grab.)

Q. What are the factors which lead you to that conclusion?

A. The Gerlinger structure has a load-controlled stop only for automatically stopping the power transmission means in the up direction, while Willamette and Nicholson have a lift-controlled stop.

Q. Would you say, then, that the Willamette carrier employs the mode of operation of the Gerlinger patent or the mode of operation of the prior Nicholson patent?

A. Willamette employs the mode of operation of the prior Nicholson patent and not of the Gerlinger patent.

Q. Again referring to the mere language as it appears on the chart Exhibit 65, will you state whether or not the parts enumerated by that language are found in the French construction shown on the chart Exhibit 65?

A. Yes, they are.

Q. And again do we find that presence of those parts indicated by correspondence of colors between the mechanism and the wording on the chart?

A. Yes.

Q. In the representations of the Willamette carrier here in evidence would you say that the colored mechanisms on those representations of the Willamette carrier are an employment of a combination of parts found in the Gerlinger patent or an employment of a combination of parts found in the French patent?

(Testimony of Gustav A. Grab.)

A. The colored mechanisms on Willamette exhibits are an appropriation of the mechanisms as shown in the French patent and not of the ones shown in the Gerlinger patent.

Q. What features of construction in the machines referred to lead you to that conclusion?

A. The automatic means for arresting upward motion of the load [603] lifting means in the Gerlinger patent is a load-controlled stop, while in Willamette and French they are lift-controlled stops.

Q. Would you say, then, that the Willamette machine employs the mode of operation of the French patent or the mode of operation characteristic of the Gerlinger machine?

A. Willamette employs the mode of operation of the prior art French patent or machine, and not of the Gerlinger patent or machine.

Q. Looking now at the chart of the Towson patent, Exhibit 67, will you state whether or not as far as the mere language is concerned you find in the drawings of the Towson machine the various parts enumerated in the printed portion of that chart?

A. Yes, I do.

Q. And they also are indicated on this chart by identity of color?

A. Yes, they are.

Q. In the Willamette construction is it your opinion that we find a combination of parts such as disclosed in the Towson patent or the combination of parts found in the Gerlinger patent in suit?

(Testimony of Gustav A. Grab.)

A. I find the Towson construction in Willamette and not the Gerlinger construction.

Q. And what factors in the respective constructions of the machines indicate that conclusion to you?

A. Gerlinger has a load-controlled stop, while Towson and Willamette have a lift-controlled stop.

Q. Would you say, then, that Willamette employs the mode of operation of Towson or the mode of operation of Gerlinger?

A. Willamette employs the mode of operation of Towson and not of Gerlinger.

Q. Do you find on the chart Exhibit 70 of the Carr patent the combination of parts which are enumerated in the language [604] appearing on that chart, inasfar as the mere face meaning of the language is concerned? A. Yes, I do.

Q. Will you state whether or not in your opinion the Willamette carrier in the parts shown in various colors on the exhibits in the record is an employment of the combination of parts found in the Carr patent or is an employment of the combination of parts found in the Gerlinger patent in suit?

A. Willamette has the parts and combination of Carr and not of Gerlinger.

Q. What is it in the Carr and Willamette structures which lead you to that conclusion?

A. Carr and Willamette have a lift-controlled stop, while Gerlinger has a load-controlled stop.

(Testimony of Gustav A. Grab.)

Q. And how, then, does the mode of operation of Carr and Willamette compare with the mode of operation of the Gerlinger machine?

A. Willamette and Carr are the same, but different than Gerlinger.

Q. In view of the various comparisons which you have now made between the colored combination of parts in the Willamette carrier and the various prior art structures, you may state whether or not in your opinion the colored parts of the Willamette carrier in evidence are an appropriation of prior art construction or whether they are the use of a combination found in the Gerlinger patent?

A. The colored combination shown on the Willamette structure and exhibits is clearly an appropriation of the prior art structures and not of Gerlinger.

Q. And, based upon the various comparisons which you have made, will you state whether or not in your opinion the mode of operation of the Willamette carrier is a mode of operation found in the prior art or a mode of operation peculiar to the [605] Gerlinger patent?

A. The mode of operation in Willamette is the same mode of operation as found in the prior art and not as found in Gerlinger.

Mr. Fryer: May I see Exhibit 47, if the Court please?

The Master: Certainly.

Mr. Fryer: I think we may save time and use 48 instead, if the Court please.

(Testimony of Gustav A. Grab.)

The Master: Beg your pardon?

Mr. Fryer: We will save time and use 48 instead, which is an enlarged view of the same structure.

The Master: All right.

Q. (By Mr. Fryer): You are the G. A. Grab on whose application patents 1838939 issued?

A. Yes.

Q. Will you state whether or not you ever built a machine having part 79 of that patent in it as shown on the chart Exhibit 48?

A. Yes, only experimentally.

Q. Will you state whether or not that mechanism like the bar 79 and connected instrumentalities was successful from an operating standpoint?

A. No, it was not.

Q. Will you state whether or not the defendant Willamette-Hyster Company at any time within six years prior to the bringing of this suit made or sold a machine containing in it a part having the construction or operation of the part 79 on Exhibit 48?

A. No, it has not.

Q. In other words, that member in that machine on Exhibit 48 which was designed to be engaged by the load in certain operations was never put into practical or commercial use by defendant Willamette-Hyster Company within six years prior to the filing of this suit, is that right? [606]

A. That is right.

Mr. Fryer: You may cross examine.

(Testimony of Gustav A. Grab.)

Cross Examination

By Mr. Geisler:

Q. You have worked in lumber yards, have you not?

A. I have worked in lumber yards for a few days to become acquainted with the operation of carriers.

Q. You have operated carriers in lumber yards?

A. Yes, I have, for the sake of becoming acquainted with the actual operation of the carrier.

Q. You operated them as a driver, as I understand it?

A. No, I did not. I operated them in the capacity of the man who built them and to gain some actual knowledge as to how to operate a carrier.

Q. At all events, you are familiar with the type of carriers used in a lumber yard?

A. Yes, I am.

Q. Is it not a fact that there are two distinct types used, one of a type similar to Defendants' Exhibit 41, which is generally referred to as a front-end-lift truck, and another one generally designated as a lumber carrier of the straddle type?

A. That is not quite true. We have one carrier which is a straight end-lift type, we have carriers which are straddle types only, and we have carriers which are a combination of straddle and end-lift carriers.

Q. But, now, the construction of the devices on an end-lift truck are quite different in purpose and

(Testimony of Gustav A. Grab.)

operation from those of the straddle type of lumber carrier?

A. No, they are not, in my opinion.

Q. I see. Would you use a lift truck, front-end-lift truck, for carrying a load of lumber from one point of a lumber yard to another?

A. Yes. In fact, we do so in various operations.

[607]

Q. Is it not a fact that the front-end-lift truck is used primarily for the purpose of tiering lumber? Do you know what I mean by tiering?

A. Yes, I do. It is one of the purposes, yes, but it is also used just—or, I believe, more extensively in just elevating lumber and carrying it from place to place in lumbering operations, particularly in box factories, in plants—or in other plants where particularly short lumber is used, such as furniture factories, battery separator plants, and so on.

Q. Well, I am not referring to any particular lumber yard. I am referring to a lumber yard such as, for instance, operated by the Clark & Wilson Company. Are you familiar with their operations?

A. Yes, I am.

Q. Now, then, the lift truck there is used largely for handling pieces of lumber which in length are much wider than the width of the carrier?

A. To my best knowledge the Clark & Wilson Lumber Company have no end-lift carrier, no combination end-lift and straddle carrier, at all.

Q. Well, have you seen a lift truck used in another lumber mill?

(Testimony of Gustav A. Grab.)

A. All along during my calls at the various mills, up until the time it took most of my time to prepare for this trial.

Q. Well, isn't it a fact that the——

The Master: I didn't get that. Read that question and answer.

(The question and answer referred to were thereupon read.)

Q. (By Mr. Geisler): Isn't it a fact that in some of the lumber mills which you saw the pieces of lumber carried by a lift truck were much longer than the width of the carriers, so that the ends projected beyond the sides of the carrier? [608]

A. That is right, with the exception of, as I stated heretofore, where they use a lot of short lumber, such as box shook, in which case the loads are approximately the width of the end-lift carrier or even shorter than the width of the end-lift carrier.

Q. Are you familiar with the use of a sorting table in a lumber yard? A. Yes, I am.

Q. Now, the sorting table consists of an endless moving platform, on which the lumber is deposited in different sizes, is that right?

A. That is right.

Q. And there are attendants standing at both sides of this sorting table—right?

A. Yes, including the end of such a table.

Q. Now, in sorting, these attendants pull off the different size pieces of lumber from both sides of the sorting table and stack it in piles, is that correct? A. Yes, that is correct.

(Testimony of Gustav A. Grab.)

Q. Now, what is the distance between those piles as stacked?

A. They vary as to the length, height and width.

Q. Now, that is not my question. What is the space between the stacks of adjacent lumber piles?

A. It is approximately the same between all the different piles.

Q. That is not my question. What is the distance—you understand the question, don't you?

A. Yes.

Mr. Fryer: We object to this line of examination, if the Court please. It has certainly nothing to do with anything this witness stated on direct. He did not testify about any lumber sorting tables or the size of the piles of lumber in sorting tables, or anything of that sort.

The Master: Overruled. [609]

A. If you want to ask me in this case, or if you want me to interpret this question——

Mr. Geisler: I ask your Honor to kindly direct the witness to give me an answer to that question.

The Master: Do you understand the question, Mr. Grab?

A. Not until I am allowed to make an explanation as to what the question actually is.

Mr. Fryer: I think it is evident the witness does not understand the question. I don't understand it, and I think he is entitled to have a proper question put to him, even though the examination has nothing to do with his direct testimony.

(Testimony of Gustav A. Grab.)

The Master: I think it has something to do with the direct examination. You may restate the question, Mr. Geisler.

Mr. Geisler: I will put the words "distance in feet", then, in the question.

The Master: Between these piles as they are stacked along the side of the sorting table?

Mr. Geisler: Yes, your Honor.

The Master: You understand that, don't you, Mr. Grab? A. Yes.

The Master: Will you answer the question?

A. They are a comparatively narrow space.

The Master: Approximately how many feet?

A. Approximately two feet.

Q. (By Mr. Geisler): Now, it would be impossible to get a lift truck into that space, would it not? A. No, it would not.

Q. Would it be possible to get—you couldn't get a lift truck into that space, could you?

A. You could not get an end-lift—a straight end-lift carrier into that space.

Q. The only way you could pick up these lumber piles would be by the use of a lumber carrier of the straddle type? [610]

A. No, not necessarily, because in this sorting chain operation, which is one of the numerous operations in a sawmill, in a great many cases these piles are picked up with an overhead hoist which is lowered from the top over the load and picked up in that manner and transported with an overhead system.

(Testimony of Gustav A. Grab.)

Q. Well, I haven't reference to any other system of moving lumber piles than just lumber carriers, what we are talking about. Now, to use a lumber carrier would you not have to use a lumber carrier of the straddle type to pick up those piles of lumber arranged on both sides—on either side of the sorting table?

A. No, I can't answer that question as yes, because the overhead system are also referred to as lumber carriers in the trade and among the operators.

Q. I am referring, then, to a wheel-mounted lumber carrier, just like the plaintiff's patent here in suit, and like the drawing of your patent shows.

A. Of course, a wheeled lumber carrier, if that is the only means of handling that particular lumber from the sorting chain, is the means for taking the piles away.

Q. Please look at that photo and state whether that does not show a customary arrangement of lumber piles in a lumber yard?

A. Yes, it does, if straddle type carriers are used only.

Q. The space in a lumber yard has to be economized as much as possible, is that not so?

Mr. Fryer: I don't believe that is cross examination, if your Honor please.

The Master: I think it is——

Mr. Fryer: He is not an expert on lumber yards. We object to it on that ground.

(Testimony of Gustav A. Grab.)

The Master: Well, perhaps not. If he doesn't know, why, he can answer it. I think the objection will be overruled. [611]

A. May I ask to have the question read, please?
(The question was thereupon read.)

A. Yes.

Mr. Geisler: I offer that as plaintiff's exhibit, whatever the next number is.

Mr. Fryer: We object to it on the ground it has not been authenticated, no proper foundation made, and it is not material or relevant to any issue in the case.

The Master: I think the witness has testified, as I recollect it, that this is illustrative of the way lumber is piled where straddle carriers are used. If I misunderstood him I would like to be corrected.

Mr. Fryer: I am quite sure there is no foundation for the photograph as a proper representation of anything.

The Master: The objection will be overruled. It will be received. It becomes 71.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 71.)

Q. (By Mr. Geisler): Will you please look at this photo and state, Mr. Grab, whether that does or does not show common arrangement of lumber piles in a lumber yard?

A. Yes; where straddle type carriers are used only.

(Testimony of Gustav A. Grab.)

Mr. Geisler: I offer that in evidence as Plaintiff's Exhibit 72.

Mr. Fryer: We make the same objection, if your Honor please, upon the same grounds urged with respect to the photograph previously received.

The Master: The same ruling.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 72.)

Q. Please examine this photo and state whether that does not [612] represent a common mode in which a lumber carrier of the straddle type is employed for picking up piles of lumber stacked along the sorting chain or table.

A. There is no sorting chain shown in this photograph. However, the loads apparently have been posed to be spaced approximately the same as they would ordinarily be spaced at a sorting chain.

Mr. Geisler: I offer that in evidence.

Mr. Fryer: We make the same objection, if the Court please.

The Master: The same ruling.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 73.)

Q. (By Mr. Geisler): Will you please look at this photograph and state if that does not show the usual operation of the lumber carrier of the straddle type in picking up a stack of lumber piled on either side or one side of a sorting chain?

(Testimony of Gustav A. Grab.)

A. Yes, it does.

Mr. Geisler: I offer that in evidence, if your Honor please.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 74.)

Q. (By Mr. Geisler): I will ask you to please look at this photo and state if that does not also illustrate the use of a straddle type lumber carrier for picking up a pile of lumber arranged alongside of a sorting chain.

A. Yes, it does.

Mr. Geisler: I offer that in evidence, if your Honor please.

The Master: Complainant's Exhibit 75. It will be received.

(The photograph referred to was thereupon received in evidence and marked Complainant's Exhibit 75.)

Q. (By Mr. Geisler): Now as I understand, the defendant's lift truck, as shown in the Defendants' Exhibit 41—if the witness will kindly be shown Exhibit 41.

The Master: Is that the circular? [613]

Mr. Geisler: It is the circular.

Q. (Continuing): —is the same kind of wheeled mounted hoist as is shown, for example, in the Carr patent that you referred to?

A. Yes, it is a similar structure as the one shown in the Carr patent.

(Testimony of Gustav A. Grab.)

Q. A front end or lift truck, such as shown by Defendants' Exhibit 41, can pick up lumber only, a pile of lumber only from the side of the pile; is that right? A. No, that is not right.

Q. You would pick up by means of that truck a pile of lumber by trying to insert the front end lift portion under the end of the pile? A. Oh, yes.

Q. How would you hold it in place? How would you hold the pile in place on those arms that carry the lumber?

A. If the length of the load is not a great deal greater than its width it doesn't matter whether the load is picked up from the side or the end, and in the operations I have seen I believe that the loads are picked up from the end by the lift truck just as much as they are from the side.

Q. Now a lift truck has but two arms which are spaced a considerable distance apart; is that correct? A. No, that is not correct.

Q. Will you please look at Defendants' Exhibit 41; that is the kind of a lift truck that I am referring to. Now has not that only two arms which project from the front end of the hoisting devices and serve to carry the load? A. This——

Mr. Geisler: No. Please answer my question; then you can explain.

A. Yes. The photograph shown in this exhibit shows arms only. However, it is common practice, and we have used platforms in place of arms only if the customer desires to use a platform. [614]

(Testimony of Gustav A. Grab.)

Q. When you use arms only, then the only way the lift truck would pick up a load would be from the side; is that right? A. No, it would not.

Q. Well, how would you pick up—look at Defendants' Exhibit 41 and imagine that that, or let us suppose that that pile of lumber is placed on bolsters and we are going to pick up that pile of lumber from the end on the two arms of this lift truck spaced apart as shown in Exhibit 41, how would you do it?

Mr. Fryer: May I have that question read, please?

(Last question read.)

A. It is a well known fact that loads of lumber that are to be handled by any kind of a lumber carrier, whether it is end lift or the straddle type, the loads are always placed on convenient platforms or bolsters. If I would choose to pick this particular load up from the end I would pick up the bolsters with it, the same as I would have to do on a straddle type carrier.

Q. You couldn't carry the pile of lumber, though, by picking it up from the end in the same way as carried there, or shown to be carried, by the lift truck in Defendants' Exhibit 41?

A. No, I could not. And, furthermore, it could not be done with a straddle type carrier.

Q. (By Mr. Geisler): Mr. Grab, could you handle all types of loads as in an ordinary lumber yard either from the side or the end with a lift truck alone? A. No.

(Testimony of Gustav A. Grab.)

The Master: When you speak of a lift truck, what do you refer to?

Mr. Geisler: Your Honor, a lift truck is that one——

The Master: You mean a front end lift?

Mr. Geisler: Front end lift.

The Master: Oh.

Mr. Geisler: They have so designated it on 41.
[615]

The Master: I see; just so we will know.

Mr. Geisler: Yes, sir.

Q. Could you operate a front end lift truck in connection with a sorting chain, such as shown in the photographs I referred you to a few minutes ago?

A. No, not with the particular type of sorting chain shown.

Q. Referring to the back of the circular. Defendants' Exhibit 41 and the lower figure shown in outline, having particular reference to those arms on which the load is to be carried, now if the length of the sticks of lumber that you were going to pick up were in excess of twice the length of those arms you couldn't pick them up, could you? A. No.

Q. Are these front end lift trucks used in the lumber yards as a substitute for lumber carriers?

The Witness: I didn't quite get all the question.

Q. Are these front end lift trucks used as a substitute in lumber yards for straddle type of lumber carriers? A. Yes.

(Testimony of Gustav A. Grab.)

Q. Where the lumber yard uses a sorting chain?

A. No.

Q. What is the approximate speed of the straddle type of lumber carrier?

A. About ten miles per hour.

Q. Is that in the yard, lumber yard, or on the road?

A. In a yard.

Q. When you use them on the road of course they would have much greater speed?

A. No; that is the maximum speed.

Q. Of the straddle type of lumber carriers?

A. Of end lift carriers.

Q. No; I was referring, Mr. Grab, to straddle type of lumber carriers. [616]

A. Oh, I beg your pardon. I didn't understand your question quite right then. Straddle type carriers have a high road speed of approximately as great as fifty miles per hour and the ordinary operating speed in the yard I should say is about twelve to sixteen or eighteen miles per hour.

The Master: Pardon me; is that maximum speed fifty?

The Witness: Fifty, your Honor.

Mr. Fryer: How do you spell it?

The Master: F-i-f-t-y.

Q. (By Mr. Geisler): When a load is to be moved from one end of a yard to another end of the yard, we will say, it is customary to employ a straddle type of lumber carrier?

A. If they have a straddle type carrier and if the distances are great, yes.

(Testimony of Gustav A. Grab.)

Q. Now what is the speed at which a truck lift carrier is operated?

A. An end lift carrier is operated at the advertised speeds of up to ten miles per hour.

Q. The speed at which that is run would depend upon the condition of the flooring of the lumber yard when the front end truck, lift truck, is operated in the yard?

A. Yes, that is right.

Q. Because if the lumber were piled crosswise of a carrier as shown in Defendants' Exhibit 41, if the front end lift truck were run at too great a speed, why, the load would be jostled off, thrown off; is that right?

A. Yes, that is right.

Q. Could a lumber carrier of a front end truck type as shown by Defendants' Exhibit 41 handle as much lumber during a day's operation as a straddle type of lumber carrier, and such as described by the plaintiff's patent in suit and shown by your patent in evidence here?

A. Yes, it could. [617]

Q. Did you understand my question?

A. Yes, Mr. Geisler.

Q. That a lift truck could handle just as much lumber as a straddle type of truck?

A. Yes.

Q. Does that relate to mills which employ sorting chains?

A. No.

Q. Would you recommend the use of a front end lift truck as a substitute for straddle type of lumber carrier in a lumber yard?

A. Yes.

Q. If you had but one carrier to use, or if the lumber yard were going to buy but one lumber carrier?

A. Yes.

(Testimony of Gustav A. Grab.)

Q. Now supposing that lumber yard had a sorting chain, would you then recommend the use of a front and lift truck as a substitute, and exclusively, for a lumber carrier of the straddle type?

A. No, I would not.

Q. Now, I call your attention to the Dingee patent, Defendants' Exhibit 59. I haven't any copy of it. I will ask that I may have the exhibit, if it is here.

The Master: It is 59, I think.

The Witness: I have it, your Honor.

Mr. Geisler: I would like to see it.

Q. The Dingee patent No. 414,380 is dated November 5th, 1889. Now that patent illustrates and describes merely an elevator; isn't that right?

A. Yes.

Q. There is no suggestion in that patent of any kind as to the conversion of this elevator into a straddle type of lumber carrier?

A. No, there is not.

Q. The only reason you find for comparing this Dingee patent with the patent in suit is because it embodies mechanism for [618] controlling, or raising and lowering of the lift, and I believe also has a brake; is that right?

A. No.

Q. It has no brake?

A. Oh, yes, it has a brake.

Mr. Geisler: Well, now then, please answer. Will the reporter kindly read my question over; then I would like an answer.

(Testimony of Gustav A. Grab.)

Mr. Fryer: I suggest, if your Honor please, that a proper question should be put. The witness has answered every question asked of him so far.

The Master: His answer was "no".

Mr. Geisler: I see.

Q. In what respect, then, do you consider that this Dingee patent has any bearing on the patent in suit?

A. The Dingee patent has the entire combination as literally described in claim 4 of the patent in suit.

Q. Isn't it a fact that the reason you find a similarity in the Dingee patent and the patent in suit is because the Dingee patent shows mechanism for raising, limiting the raising and lowering of the elevator? That is one of the reasons?

A. Yes, that is one of the reasons.

Q. And the Dingee patent shows also a brake which is applied in cooperation with the means for limiting the raising and lowering of the elevator automatically?

A. Yes, it shows such a brake.

Q. Now what other features do you find in that Dingee patent that are suggestive of the plaintiff's patent?

A. I find the entire combination as described by claim 4.

Q. That is a conclusion. I would like you to point out specifically what parts, referring to the

(Testimony of Gustav A. Grab.)

drawing of the Dingee patent and the specification, which you believe to be like the combination of the claim in suit.

A. I find a green frame; I find a purple load lifting means; I [619] find a yellow means for transmitting motion from a source of power to the load lifting means comprising a clutch that can be set in neutral position or to cause the load lifting means to move in either direction; I find a brown means——

Q. Now just a moment, Mr. Grab. You are reading from a paper before you. What is that paper?

A. It is a copy of claim 4.

Q. I didn't ask you to read claim 4. I asked you to please point out specifically, without any reference to claim 4 specifically in the Dingee patent the parts which are shown in the drawing and the description thereof in the specification which in your opinion you believe to be similar to the patent in suit. Now will you please close up that legend before you.

Mr. Fryer: I submit, if your Honor please, that the witness should be permitted to have the Dingee patent before him.

Mr. Geisler: Oh, yes; I have no objection to that.

The Master: He may have the Dingee patent before him.

(Testimony of Gustav A. Grab.)

Mr. Fryer: What he had was Exhibit 60, a copy of the Dingee drawings. Now if he may not have Exhibit 60 I suggest that he have a copy of the Dingee patent.

Mr. Geisler: Certainly.

The Master: That he is entitled to.

Mr. Geisler: I thought he had it before.

Mr. Fryer: He did, but you didn't want him to look at it.

Mr. Geisler: No; I don't want him to look at the stereotyped information.

The Master: That was 61.

Mr. Fryer: 60 is the chart of the Dingee drawings, your Honor.

Mr. Geisler: 59, your Honor. I have withdrawn this. I have the only copy here.

Mr. Fryer: The witness has a copy of 59 in his book before him.

The Master: Have you got the patent itself?

[620]

The Witness: Yes, your Honor.

The Master: Refer to that.

The Witness: Yes, your Honor. May I ask an explanatory question?

The Master: Yes.

The Witness: Am I asked to compare the Dingee patent or structure with claim 4 of the patent in suit?

Mr. Geisler: No, your Honor, that was not my question. I want him to point out in the Dingee

(Testimony of Gustav A. Grab.)

patent, by reference to its drawings and specification, those parts which he believes are similar to the combination of the patent in suit, but not with reference to the elements; I mean to the structural features of the patent in suit.

The Witness: I am ready to answer the question.

The Master: Very well; proceed.

A. The Dingee patent and drawing shows a frame, a load lifting means mounted therein, a means for transmitting power from a source of power to the——

Mr. Geisler: Excuse me. I don't want it that way. I wish you would kindly refer to the drawings by number and to the specification by reference character, so we can follow what you are talking about.

The Witness: Oh, yes; I beg your pardon. The Dingee patent shown a frame consisting of parts capital B-1.

Q. What sheet please? Pardon me: What figure, please, I mean?

A. On Figure 2 of parts in Figure 1 which clearly indicate—of other parts in Figure 1 which clearly indicate the frame structure but are not numbered. The Dingee patent also shows a load lifting means number capital A-1. It also shows a means for transmitting power from a source of power to the load lifting means, consisting princi-

(Testimony of Gustav A. Grab.)

pally of parts small c-1, small b-2, Capital B, small c-1, small c-2, small d-1, small d. It also has means to place this load lifting—this power [621] transmission means into operative or inoperative position manually, consisting of parts capital F in Figure 1.

Q. What figure, please?

A. In Figure 1.

Q. I see. What is that part, capital F?

A. It is an endless cable.

Q. Proceed, please.

A. Further, this manual means for placing the power transmission means in operative position manually or automatically on Figure 2, lugs small f-2, on this endless cable capital F in Figure 1, this cable passing through operating lever capital E-4 on Figure 2, the endless cable and this lever operating clutch operating shaft E-4 capital E, rather, in Figure 2. The Dingee structure also has automatic means for returning the power transmission means to neutral position, consisting of, referring to Figure 1, stop lever arm small a-1 and stops capital F-1 fastened to the endless cable capital F. The Dingee patent also has an automatic brake shown in Figure 1 consisting of small e-4 mounted on the eccentric small e-1, which in turn is fastened to the clutch operating shaft capital E.

Q. Well, summing up all that you have said, the devices which you describe, putting it in con-

(Testimony of Gustav A. Grab.)

crete form, is a description of nothing more than a means for controlling a hoist with regard to its raising and lowering and stopping means for that purpose, and applying a brake to the device at the moment it stopped; is that correct?

The Witness: I didn't follow the entire question, if you please.

The Master: Read the question.

(Last question read.)

A. No.

Q. (By Mr. Geisler) Why is it not?

A. It is a description of an entire combination of a hoist, [622] including the various mechanisms and parts you describe.

Q. It is a description of a hoist in which the raising and lowering of the load carrying part is controlled by automatic stops? A. Yes.

Q. And has a brake element which is applied when those automatic stops are thrown into action? A. Yes.

Q. Now this is an elevator, as we all understand?

Mr. Fryer: That has been asked and answered once before, and we object to it on that ground.

The Master: Proceed.

Q. (By Mr. Geisler) Now you told us that you would have no difficulty in converting this Dingee patent into a straddle type of lumber carrier, did you not?

(Testimony of Gustav A. Grab.)

A. I don't recall saying that.

Q. Well, would you have any difficulty in converting this Dingee elevator construction or incorporating it into a lumber carrier? A. No.

Q. Now what would you do in order to place this Dingee lift control into a lumber carrier of the straddle type? Just proceed as you would if you were designing it. What would you do?

A. I would simply mount a mechanism of substantially the same construction, with minor modifications in the form, on a wheeled truck.

Q. I am not talking about a wheeled truck, Mr. Grab; I am talking about a straddle type of lumber carrier.

Mr. Fryer: May I have the last question read, if your Honor please, preceding this one?

The Master: Read it, please.

(The question was read as follows: "Now what would you do in order to place the Dingee lift control into a lumber carrier of the straddle type? Just proceed as you would if you were designing it. What would you do?") [623]

Mr. Fryer: Now may I have the answer?

(Last answer read.)

Mr. Fryer: We object to the last answer, if your Honor please, on the ground that it is repetitious and misleading. I mean the question.

Mr. Geisler: Now please read my last question.

(Testimony of Gustav A. Grab.)

The Master: Read the last question.

(The last question was read as follows: "I am not talking about a wheeled truck, Mr. Grab; I am talking about a straddle type of lumber carrier.")

The Master: Well, that is not a question.

Mr. Fryer: That is why I object to it. It is a statement and it is misleading to the witness. I think the witness has answered the last question that was addressed to him, and the last statement was——

The Master: He may have done that, but counsel has interjected an explanation; he has not asked a substantive question.

Mr. Geisler: I see the point.

The Master: So if you incorporate what you have in mind in a question, then we will proceed.

Mr. Geisler: Yes, your Honor. Correct. If the reporter would kindly read over the question, the original question which the witness answered, I would ask him to do that?

(The question referred to was read as follows: "Now what would you do in order to place the Dingee lift control into a lumber carrier of the straddle type? Just proceed as you would if you were designing it. What would you do?")

(Testimony of Gustav A. Grab.)

Mr. Geisler: Please remember we are talking about a straddle type of lumber carrier, not about a mere truck, wheeled truck.

The Master: You desire him to answer the previous question, bearing in mind that you are talking about a straddle type lumber carrier?

Mr. Geisler: Yes, your Honor. [624]

The Master: Now will you kindly do that, Mr. Grab.

A. For a straddle type carrier a particular type truck of the straddle type would be necessary to mount this combination into.

Q. (By Mr. Geisler) Then if you had such particular type of straddle carrier, you would have to place these control elements into that, would you not—lift control elements?

A. Yes, on to its frame.

Q. You would have to arrange the parts which make up the lift control elements and the brake, rearrange them, I mean, so that you could incorporate them in a straddle type of lumber carrier?

A. I would have to rearrange them as far as form is concerned, but not as far as mode of operation or function are concerned.

Q. Now if you did not have a straddle type of lumber carrier in mind, would the Dingee patent suggest to you the building of a straddle type of lumber carrier with automatic stops as you mentioned? Automatic controls, I meant to say.

(Testimony of Gustav A. Grab.)

A. No, it would not suggest a straddle type carrier but it would suggest a lumber carrier.

Q. You mean it would suggest a truck of some kind with hoisting mechanism and controls for the hoisting mechanism?

A. Yes; it would suggest a truck which would elevate and carry lumber or other materials.

Q. Now I call your attention to the Nicholson patent, Defendants' Exhibit 62. I am going to ask you to have reference to the patent only, Mr. Grab. A. Yes.

Q. This is patent No. 1,340,458 and dated May 18th, 1920. This is a portable hoisting device, broadly putting it, is it not? A. Yes.

Q. The hoist mechanism can perform two operations, one in which the load lifting device is merely lifted vertically and another operation, which is option, I assume from the drawing, it may be tilted? [625] A. Yes.

Q. Is that correct? A. Yes.

Q. Now referring to the operation which concerns the mere raising and lowering of the platform 4, I believe it is designated in Figure 1, there are means provided for raising and lowering this platform vertically; is that correct? A. Yes.

Q. And there are means provided which limit the raising and lowering operation to two predetermined points; is that correct? A. Yes.

(Testimony of Gustav A. Grab.)

Q. And there are means provided for applying a brake, I believe. Also, when the stopping automatic stops are thrown into action? A. Yes.

Q. Now let us compare with that the Defendants' Exhibit 41, which shows on the circular. You have it there, Mr. Grab? A. I have it here.

Q. The lift truck. The devices which I refer to in the Nicholson patent with regard to the raising and lowering of the load vertically and the means for controlling this lifting mechanism are the same as are shown, or the same, I should say, as are employed in the defendant's lift truck, Exhibit 41; isn't that correct?

A. Yes, substantially the same.

Q. Is there anything suggestive in this Nicholson patent with regard to the incorporation of the lift controlling devices into a lumber truck?

A. Yes.

Q. That is, if you had a lumber truck in mind?

A. Not necessarily, no.

Q. If you do not have a lumber truck in mind, would this Nicholson patent suggest to you the building of a straddle type of lumber carrier with lift controls? [626]

A. No, not of a straddle type, at first glance.

Q. All it suggests is merely a lift truck; is that correct?

A. Yes, a lift truck or a material carrier.

(Testimony of Gustav A. Grab.)

Q. In order to incorporate the mechanism shown in the Nicholson patent into a lumber carrier of the straddle type, it would be necessary for you to rearrange the parts of the lift control as shown—the parts suggested in the Nicholson lift control; is that right?

A. Yes, only as far as the form is concerned, but not as to mode of operation or function.

GUSTAV A. GRAB

thereupon resumed the witness stand, and was examined and testified further as follows:

Cross Examination

resumed:

Q. (By Mr. Geisler) Going back a moment, Mr. Grab, to the differences in the lift truck, front-end-lift truck, such as manufactured by the defendant, and the straddle type of lumber carrier, is it not a fact that in loading a front-end-lift truck you would have to centralize the load?

A. I didn't get the last three words, Mr. Geisler.

Q. Centralize the load. A. Yes.

Q. Kind of balance it up.

A. Yes, in a way.

Q. That is not a condition imposed upon the use of a straddle type of lumber carrier, is that right?

(Testimony of Gustav A. Grab.)

A. Yes. Yes, it is in a way, as well.

Q. Well, ordinarily, because you pick up the load at four points, or at least by the lifting shoes, very little centralization or very little balancing of the load is required, isn't that right?

A. Very little is required. However, some is required, yes.

Q. Now, referring to the French and Pavey patent, number 1360917, [627] dated November 30, 1920, being Defendants' Exhibit 64—Have you a copy of that before you?

A. Yes, I have.

Q. —that is another example of wheel-mounted hoist, is it not?

A. Yes, it is another example of an end-mounted lifting device.

Q. When you say end-mounted you mean the carrier member projects from one end of the vehicle?

A. Yes.

Q. The reason you believe that this patent has bearing on the patent in suit is that it contains means, including a brake, for controlling automatically the raising and lowering of the lifting element, is that right?

A. Yes, it includes the entire combination described in claim 4 of the patent in suit.

Q. Does this patent suggest the building of a lumber carrier?

A. Yes, it would if I—

(Testimony of Gustav A. Grab.)

Q. I mean of this straddle type here——

Mr. Fryer: I suggest, if your Honor please, that the witness be permitted to complete his answer before being interrupted with another question.

The Master: Well, I think counsel was modifying the question.

Mr. Geisler: That is all.

Mr. Fryer: Well, may we have the answer as far as it went, then?

The Master: Oh, yes, whatever he said.

Mr. Fryer: I would like to hear it, I mean, if I may.

The Master: Oh, yes.

The Reporter (reading): “Does this patent suggest the building of a lumber carrier?”

“A. Yes, it would if I——”

Mr. Fryer: May I suggest that that answer be completed before interrupting?

Mr. Geisler: Go ahead.

The Master: Go ahead. [628]

A. Yes, it would if I had the building of a lumber carrier in mind.

Q. (By Mr. Geisler) If you did not have the building of a lumber carrier in mind would it then suggest such a lumber carrier and the inclusion of such lift-controlled elements in a straddle type of lumber carrier? A. If I——

Q. ——did not.

(Testimony of Gustav A. Grab.)

A. No, if I did not have in mind building anything it naturally would not suggest anything to me.

Q. So that patent does suggest, does it not, the building of a lumber truck with an end lift of the French and Pavey patent?

A. No, not entirely.

Q. What do you mean by "not entirely"?

A. If I had in mind building a lumber carrier it would suggest the building of any type I might have in mind.

Q. But it would not specifically suggest the building of a lumber carrier?

A. If—No, unless I had the building of a lumber carrier in mind.

Q. I now refer you to the Towson and Cochran patent number 1337804, patented April 20, 1920, being Defendants' Exhibit 66.

A. I have it before me.

Q. Thank you. That also suggests mechanism for raising a load, is that right? A. Yes.

Q. The raising of a load as shown in this particular patent is only to a small extent, very few feet, apparently, is that right?

A. That is right.

Q. The reason you believe that this particular patent has bearing on the plaintiff's patent in suit is again because it includes means for controlling automatically the raising and [629] lowering of

(Testimony of Gustav A. Grab.)

the lifting, element in this patent, also including a brake, is that right?

A. Yes, it has the entire combination described in the claim of the patent in suit.

Q. When you mentioned the entire combination, as you put it, you have reference to the means shown in the plaintiff's patent for limiting the raising and lowering of the lifting devices, load lifting devices, by automatic stops and also a brake which is applied when those stops are thrown into action, is that right?

A. Yes, those features, together with the other parts of the combination described in the claim.

Q. Now, what other parts have you reference to, Mr. Grab?

A. A frame and a load lifting means mounted therein, and means to manually place the load lifting—or the power transmission means into operative and inoperative position.

Q. Anything else?

A. I would have to have the question again to know if I have missed any in my last answer.

Mr. Geisler: All right.

The Master: Read the preceding question.

(The last three questions and the answers thereto were thereupon read.)

A. No, that is all. I think that is the entire combination mentioned in that claim.

Q. You what?

(Testimony of Gustav A. Grab.)

A. To my best recollection that is the entire combination mentioned in claim 4.

Q. I did not ask you about claim 4. I wanted to know from you what parts you find in the Towson and Cochran patent which have any bearing on the plaintiff's patent, the structure shown in the plaintiff's patent?

A. May I ask if you want me to describe the particular parts, Mr. Geisler, by number and name?

[630]

Q. Yes, if you want to go into the details, I would like to get your statement about this patent.

Mr. Fryer: We suggest, then, if that is the purpose of the examination, the witness be allowed to refer to the plaintiff's patent in suit, which he is now asked to compare with this prior Towson patent.

Mr. Geisler: Most assuredly.

Mr. Fryer: Then we request that the witness in making his answer compare the plaintiff's patent in suit, Exhibit 2, with the Towson patent.

Mr. Geisler: No objection.

Mr. Fryer: Have you a copy of each of the patents with you, Mr. Grab?

A. Yes, I have.

Mr. Fryer: Very well.

A. The Towson patent describes an industrial truck or material carrier capable of elevating and

(Testimony of Gustav A. Grab.)

transporting materials. It consists of a wheeled frame, some of which are parts number 10 and number 13, in which a load lifting means is mounted consisting of parts number 20, 30, 31, 35, 41, 34, 41, 37, 21, and some other minor parts which are parts of the general load lifting means. It also has means for transmitting power from a source of power, the source of power in this case on the Towson patent being an electric motor number 67, shown plainly in Figure 5. The means for transmitting motion are a reversing mechanism shown in Figure 6, consisting mainly of parts 80, 83, 81 and 82. This reversing mechanism is of such nature as to put the power transmission means into raising or lowering position as well as into neutral position. The power transmission means consists mainly of parts 47, 48, 61, 60 and 67. This Towson device also shows means for manually engaging the power transmission means, as well as to disengage the same. These means are shown as parts number 87 and 86 in Figure No. 1. The [631] Towson patent also shows automatic means for stopping the load lifting means, or power transmission means, rather, whenever the load lifting means reaches a predetermined position. These automatic stop means are shown in Figure 6, consisting mainly of parts 91, 92, 93, 94, 95, 96 and 97. The device also shows an automatic brake mechanism shown and described as part 100 on Figure 5 of the patent.

(Testimony of Gustav A. Grab.)

Q. (By Mr. Geisler) Does this Towson and Cochran patent suggest the building of a straddle type of lumber carrier?

A. Yes, if I had the building of a straddle type lumber carrier in mind it would.

Q. If you did not have that in mind, would it?

A. It would not, because if I did not have anything in mind it could not suggest anything to me.

Q. Now, referring to the Carr patent, Defendants' Exhibit 69——

A. I have it before me, Mr. Geisler.

Q. Thank you. That is 1407024, patented February 21, 1922.

A. I have it before me.

Q. This patent also shows a wheel-mounted hoisting device, does it not? A. Yes.

Q. And it includes means for limiting the raising and lowering of the load carrying element and for applying a brake when the limitations have been reached, does it not? A. Yes.

Q. Taking all these patents which we have referred to, Dingee, Defendants' Exhibit 59, Nicholson, Defendants' Exhibit 62, French and Pavey, Defendants' 64, Towson and Cochran, Defendants' 66, and Carr, Defendants' 69, all of them show examples of wheel-mounted hoists and are substantially alike in principle of operation?

A. Yes.

(Testimony of Gustav A. Grab.)

Q. None of them would suggest the building of a lumber carrier [632] if you did not have a lumber carrier in mind, is that right? A. No.

Q. If you did not have a lumber carrier in mind would they suggest the building of a lumber carrier? A. No.

Q. All they might suggest to you would be the building of some kind of a truck for lifting a load, regardless of what is to be lifted, is that right?

A. Yes, if I had the building of such a truck in mind.

Q. You are familiar with the classification of lumber carriers, lumber trucks, as put out by the defendant Willamette-Hyster, are you not?

A. I am afraid I don't quite understand the question.

The Master: Read the question.

(The question was thereupon read.)

A. May I ask if you mean the word, the meaning of the word, or classification by any certain patent or patents?

Q. (By Mr. Geisler) No, what I mean is, are there not two general types of lumber carriers, the one being specifically known as the straddle type and the other as the lift truck type? A. No.

Q. Are you familiar with the advertising of the lumber carriers put out by the defendant Willamette-Hyster Company?

A. Yes, I am.

(Testimony of Gustav A. Grab.)

Q. You have anything with the forming or the framing of the advertising to do—suggestions in regard to it? A. Yes, I do.

Q. Now I show you here the October issue, 1936, of *The Timberman*, the back of that magazine. Now on the lower right hand corner is one type of carrier, which is of the straddle type, is it not?

A. Yes.

Q. The picture show there is? [633]

A. Yes.

Q. Isn't that known to the trade by the name straddle type, or words to that effect, as shown on that advertisement?

A. Yes. It is also known as just a plain carrier or lumber carrier.

Q. As advertised on the back of that particular magazine, however, the word "straddle" or "straddling" is specifically associated with that cut, is it not? A. It is not.

Q. It appears right over that cut, does it not?

A. Yes, but underneath and alongside of other cuts as well.

Q. Now on the upper left hand corner of the back of that magazine is pictured the end lift truck; is that right? A. Yes.

Q. An end lift truck, as far as the products of defendant Willamette-Hyster Company are concerned, always designates lift trucks substantially as shown by Defendants' Exhibit 41? That is that circular I have reference to? A. No.

(Testimony of Gustav A. Grab.)

Q. You have other types of end lift trucks manufactured by the defendant, too? A. Yes.

Q. Have you got samples of them here?

A. Yes, we have. We have our regular advertising matter on Willamette Utility Carriers, a copy of which I have here.

Q. Would you turn to the first inside page, turning over the cover, and I will ask you to read what it states on that inside page?

A. Speed, power, quality. Pneumatic or solid tires. Gasoline or full Diesel power plants.

Q. What does it give a picture of underneath that statement?

A. It gives a picture of Willamette Utility Carrier.

Q. Of what type? Of straddle type? [634]

A. Of the straddle type.

Q. What does it say underneath that?

A. "America's Finest Straddle Truck, Willamette Utility Carrier. 50 miles per hour. Four wheel steering. Four wheel hydraulic brakes. Same speeds forward and reverse. For transporting and high piling. The self-loading and self-unloading straddle type truck for carrying lumber, pulp, paper, pipe, steel, brick, tile. Any material! Any length! Anywhere! Willamette-Hyster Company, Portland, Oregon."

Mr. Fryer: We now offer in evidence, if your Honor please, the advertising material produced by

(Testimony of Gustav A. Grab.)

the witness and ask that it be marked Respondents' Exhibit 76.

Mr. Geisler: Are you introducing it?

Mr. Fryer: Yes.

Mr. Geisler: I was going to save you the trouble. However, either way; it is immaterial.

The Master: It will become Respondents' Exhibit 76.

Mr. Geisler: May I compare that one, your Honor, with the one I have here?

The Master: Yes.

Mr. Geisler: To make the thing more specific, I am offering on behalf of the plaintiff only the first sheet of that particular circular or book, not being familiar with the rest of it.

The Master: You may change your legend on that. Sheet 1 of this book will be marked Complainant's Exhibit 76, and if at the proper time the respondent desires to offer any remaining part of it it may.

(The sheet so offered, being first inside sheet of book entitled "America's Finest Straddle-Truck" of the Willamette-Hyster Company was thereupon received in evidence and marked Complainant's Exhibit 76.)

Q. (By Mr. Geisler) Referring to your patent, Mr. Grab, Plaintiff's [635] Exhibit 47, lifting mechanism entitled "Lifting Mechanism for Traversing Hoists", will you kindly tell me what that

(Testimony of Gustav A. Grab.)

phrase or expression "for traversing hoists" means?

The Witness: May I see a copy of the patent, please?

(Exhibit 47 passed to the witness.)

The Witness: May I hear the question again, please? I have the exhibit now.

(Last question read.)

A. Traversing hoist means an elevator which traverses the ground or the earth, I guess, which travels on the ground.

Q. (By Mr. Geisler) The invention as a whole, however, was directed specifically to a lumber carrier of the saddle type; is that right?

Mr. Fryer: I don't know what this is cross examination of, your Honor. We object to it on this ground. This man has not been asked about the invention of any patent, particularly of this patent.

Mr. Geisler: Both parties have been examining this witness with regard to that patent before. It is in the case, your Honor. It is specifically involved here, as will appear very shortly, because I will bring it out, as will appear by the witness' evidence, it is not the direct type of lift control which is employed by the Willamette-Hyster, defendant, in the manufacture of its truck.

Mr. Fryer: On direct examination of this witness, if your Honor please, there was only one ques-

(Testimony of Gustav A. Grab.)

tion addressed to this witness that has any bearing whatsoever upon counsel's remarks. I asked him whether or not his company had ever made a machine containing in it a part like the part 79 on Exhibit 48, and the witness stated that his company experimentally had once made a machine with a part like that in it but in effect that they had never manufactured a machine having that construction or operation. Now that examination was not with respect to a patent but with [636] respect to a machine, and the reference to this chart and not the patent was merely to identify the part of the machine about which I was interrogating the witness. I asked him, "Did your company ever make a machine containing that part in it?" And he said, "Once experimentally and we abandoned it." Now that is all there is in the direct evidence of this witness bearing upon this subject in any way. He has not been interrogated about this patent, and we submit it is not cross examination and not germane to any issue in the case. In that respect we reserve leave, at a later time, to quote authorities to your Honor on that proposition.

Mr. Geisler: If the court please, it will appear that the witness here, Mr. Grab, is the manager of the department of the defendant with regard to the building of lumber carriers, and it will appear that this lumber carrier, for which he obtained a patent, is directly germane to that particular ques-

(Testimony of Gustav A. Grab.)

tion. In fact, he built it under the instructions of the defendant. It is a very important piece of evidence.

Mr. Fryer: We have no objection to plaintiff bringing in that evidence if they want to make this witness their own and examine him on it, but in that event we shall rely on the ruling of the Supreme Court in Dravo against Fabel, which makes him bound by his answer. But we do object to cross examining a witness of ours concerning a subject about which he was not examined on direct.

The Master: Let me hear the question.

(Last question read.)

The Master: The objection will be overruled for the time being until such time at least as counsel further advises the Master as to its incompetency. You may proceed.

A. No.

Q. (By Mr. Geisler) The type of load lifting devices which is shown in your patent is the same as that in substance shown or [637] employed by the Willamette-Hyster in the manufacture of their straddle type of carriers, is it not?

Mr. Fryer: May we have a ruling, your Honor, that the same objection will go to this whole line of examination with respect to the patent issued on the application of this witness?

The Master: Yes, you may have such a stipulation, and the record will show that that will be the order.

(Testimony of Gustav A. Grab.)

The Witness: May I have the question again, if I am to answer?

(Last question read.)

A. Yes, but generally only, however.

Q. (By Mr. Geisler) While in the employ of the plaintiff in its shop at Dallas you became familiar with the plaintiff's patent, Plaintiff's Exhibit 2, did you not, Mr. Grab? A. Yes.

Q. You entered the employ of the Willamette Iron & Steel Works specifically for the purpose of taking charge of their carrier department?

A. Yes.

Q. Your knowledge and experience with carriers helped you to obtain that position, I presume, did it not?

A. I didn't get the entire question.

(Last question read.)

A. No. I would say Mr. Gerlinger's knowledge of my general knowledge of automotive equipment helped me to gain that position.

The Master: I think you are talking about something else, aren't you?

Mr. Geisler: I was talking about the employment by the Willamette Iron & Steel Works.

A. I failed to get that. I thought you were talking about my employment with the Dallas Machine & Locomotive.

The Master: No. The question was whether or not your familiarity gained of lumber carriers while

(Testimony of Gustav A. Grab.)

with the Dallas Machine & [638] Locomotive Works, whether that familiarity enabled you or aided you in getting the position with the Willamette Iron & Steel.

A. Yes, among my other abilities as to selling and knowledge with automotive equipment in general.

Q. (By Mr. Geisler) Referring to the Ross carrier which you said you saw in 1923, as I understand it, from your description of other load limiting control devices the automatic lift controls which are employed in the Willamette-Ersted carrier, Defendants' Exhibit 56-B, are practically the same as that shown in the Ross carrier?

A. Yes, they are substantially the same.

Q. That is your statement; is that right?

A. Referring to the Willamette carrier?

Q. Yes. A. Yes.

Q. The difference only is that in the Ross carrier the control rod with the stops on it worked vertically while in the defendant's carrier that same kind of a rod with stops on it worked horizontally; is that right?

A. Yes, along with other minor differences in form of the machine as a whole.

Q. Do you know Mr. Ross? A. Yes, I do.

Q. The Mr. Ross that you know is the man who builds these Ross carriers; is that right?

A. I understand he is the president of the Ross Carrier Company, yes.

(Testimony of Gustav A. Grab.)

Q. Now would you state again when you saw the Ross lumber carrier?

Mr. Fryer: May I have that question read, please, your Honor?

(Last question read.)

A. Some time after the middle of 1923, I would say towards the end of 1923.

Q. (By Mr. Geisler) How did you come to look at this particular carrier? [639]

A. My duties were to repeatedly go to Clark & Wilson Lumber Company to service and fix two Gerlinger carriers which we had in operation at the plant of the Clark & Wilson Lumber Company and during one of my service calls I saw the Ross carrier there.

Q. At that time the plaintiff was not manufacturing any mechanical lift carriers, was it?

A. No.

Q. The plaintiff was manufacturing only hydraulic lift carriers? A. Yes.

Q. How did you come to be interested in the construction of a mechanical lift carrier when the plaintiff, for which you were working, was not manufacturing such a carrier?

The Witness: May I have the question, please?

(Question read.)

A. Prior to the construction of the hydraulic lift carrier I was employed by the plaintiff to construct and complete the design of a mechanical carrier.

(Testimony of Gustav A. Grab.)

Q. When did you receive that instruction from Mr. Gerlinger?

Mr. Fryer: Just a minute. May I have the last answer, please?

(Last answer read.)

Mr. Geisler: I withdraw that question.

Q. When you say instructed by the plaintiff, whom do you refer to?

Mr. Fryer: He didn't say instructed, your Honor. We object to that as misleading.

Mr. Geisler: Read it again kindly.

(The question and answer following were read:

“Q. How did you come to be interested in the construction of a mechanical lift carrier when the plaintiff, for which you were working, was not manufacturing such a carrier?

“A. Prior to the construction of the hydraulic lift carrier I was employed by the plaintiff to construct and complete the design of a mechanical carrier.”)

Q. (By Mr. Geisler) By whom were you employed in the plaintiff's shop?

A. By Mr. Gerlinger, the president of the Dallas Machine & Locomotive [640] Works, for the Dallas Machine & Locomotive Works.

Q. Was not your work merely that of carrying out the design which Mr. Gerlinger placed before you? A. No.

(Testimony of Gustav A. Grab.)

Q. You were instructed, as I understand, by Mr. Gerlinger, to build this new type of lumber carrier? A. Yes.

Q. When?

A. Prior to my actual employ by the Dallas Machine & Locomotive Works, Mr. Gerlinger approached me on different occasions and asked me to work for him to construct and help to develop a lumber carrier which he had in mind to build.

Q. That was prior to your entering the employ of the plaintiff, you say? A. Yes.

Q. When did you enter the employ of the plaintiff? A. In May, 1921.

Q. Isn't it a fact that Mr. Gerlinger told you of mechanical devices we he had relating to lumber carriers?

Mr. Fryer: We object to that unless the time and place is specified in the question. It is too indefinite to answer, if your Honor please.

The Master: Overruled.

A. I do not recall any such specific statement.

Q. (By Mr. Geisler) Do you recall a suit brought by William S. Overlin against the Dallas Machine & Locomotive Works in——

A. Yes.

Q. Wait a minute—in the District Court of the United States for the District of Oregon? Do you recall that suit? A. Yes, I do.

Q. Were you not a witness in that suit?

(Testimony of Gustav A. Grab.)

A. Yes, I was. [641]

Q. Now I will read to you from the record in that suit. This is on page 115. If your Honor please, I have here a transcript of record in that case as furnished me. I have only one copy and it was loaned to me only by the United States Circuit Court of Appeals through the courtesy of Mr. O'Brien.

Mr. Fryer: Is it a certified copy?

Mr. Geisler: It is not a certified copy.

Q. I will ask the witness if he recalls giving this testimony: "In 1918, I was foreman of the repair shop in Dallas, at which place I took care of the gasoline equipment that the Willamette Valley Lumber Company was handling the lumber with and Mr. Gerlinger was general foreman of the Southern Pacific Railroad Shops and he was repairing all the mill machinery and camp machinery for the Willamette Valley Lumber Company outside of the trucks that they handled the lumber with, and I met Mr. Gerlinger and became intimate with him and we discussed mechanical devices and the several patents that Mr. Gerlinger had, and among others he told me confidentially about this lumber carrier that he was figuring on at that time."

Mr. Fryer: Now we object to that, if your Honor please, on the ground that no proper foundation has been laid for this.

(Testimony of Gustav A. Grab.)

The Master: Sustained. Sustained upon the ground that no proper foundation has yet been laid for your previous question.

Mr. Geisler: The witness stated that he gave testimony in this particular case as a witness.

The Master: Oh, yes, but reading the testimony would not be affirmative proof of any fact. It could only be used for the purpose of impeaching this witness' testimony at this time.

Mr. Geisler: Oh, I agree with that, your Honor. I didn't get the point.

The Master: So it will be necessary for you to lay the proper foundation by oral questioning before you call his attention to this particular testimony. [642]

Mr. Geisler: Well, to make a shortcut I am asking the witness now to state whether or not he gave such testimony in that particular case.

Mr. Fryer: That is what we are objecting to, if your Honor please.

The Master: It will be sustained. The ground of the ruling, Mr. Geisler, is that you have not yet asked the witness the affirmative facts with regard to the conversation with Mr. Gerlinger. Until that has been done, then you can't impeach him by calling his attention to contradictory testimony. I would suggest that perhaps if you would lay that foundation then you may proceed with your impeachment.

(Testimony of Gustav A. Grab.)

Mr. Geisler: Well, the reason I am pursuing the course I am—perhaps I am wrong, your Honor, but the witness stated that he was instructed by Mr. Gerlinger to get up these improvements in lumber carriers and now—very well; I will ask the witness this question:

Q. Did you have any conversation with Mr. Gerlinger about the building of lumber carriers prior to your employment with him?

A. Yes, I did.

Q. Did you discuss in that conversation mechanical devices with regard to the handling of lumber?

Mr. Fryer: We object to that question, if your Honor please, unless the foundation is further laid by asking the time and place and persons present.

The Master: Of course the objection is not as yet well taken. I think he may inquire upon that subject. You will read the question to the witness and he will answer.

(Last question read.)

A. I can't answer that question yes or no, because a great deal of time has elapsed and I have no way of recalling to my mind the particular words or the specific discussions we had at that time. [643]

Q. (By Mr. Geisler) What I want to know, Mr. Grab, is whether there was any talk between you and Mr. Gerlinger prior to your employment in the plaintiff's shop with regard to lumber lifts?

(Testimony of Gustav A. Grab.)

A. Yes, there was.

Q. Did not, in that talk, Mr. Gerlinger give you some confidential information as to his plans with regard to improving lumber lifts?

Mr. Fryer: We object to that on the ground that the talk referred to is not specified by reference to the time and place and persons present.

The Master: Overruled.

A. If I disregard your reading of the term "confidential", I would say that I don't recall having any confidential talks to that effect.

Q. (By Mr. Geisler) Well, did you not so state as a witness in the trial of the suit, that you did—in a suit pending in the United States District Court, the time being 1922 or 1923, that you did have such confidential conversation with Mr. Gerlinger?

The Witness: May I hear that question again please?

(Last question read.)

Mr. Geisler: About lumber carriers?

A. I cannot say just from memory.

Q. Do you recall, recollect the extract I read from this transcript of record in the case of Overlin vs. Dallas Machine & Locomotive Works, that I read just a moment ago? Would you like me to read it again? A. If you please.

Q. "In 1918 I was foreman of the repair shop in Dallas, at which place I took care of the gaso-

(Testimony of Gustav A. Grab.)

line equipment that the Willamette Valley Lumber Company was handling the lumber with and Mr. Gerlinger was general foreman of the Southern Pacific Railroad Shops and he was repairing all the mill machinery and camp machinery for the Willamette Valley Lumber Company outside of the trucks that they handled the lumber with, and I met Mr. Gerlinger and became intimate with him and we discussed mechanical [644] devices and the several patents that Mr. Gerlinger had, and among others he told me confidentially about this lumber carrier that he was figuring on at that time." Now do you admit or deny the giving of such testimony in that suit?

Mr. Fryer: We object to that question, if your Honor please, on the ground there has no proper foundation been laid.

The Master: I am compelled at this stage of the proceeding to sustain that objection. However, inasmuch as I am sitting only as Master, I think it is proper to suggest to counsel that he may interrogate this witness as to whether the reading of that transcript refreshes his recollection as to what the facts were and we will then see what the situation is.

Mr. Geisler: Very well, your Honor. I will adopt the suggestion.

Q. Does the reading of what I just quoted from the transcript of record in the case of Overlin vs.

(Testimony of Gustav A. Grab.)

the Dallas Machine & Locomotive Works, in transcript No. 4156, refresh your recollection as to the testimony you gave in that suit as a witness?

A. Yes, it does as to the particular portion of such testimony as you read to me.

Q. Well, did you so testify or did you not so testify?

Mr. Fryer: We make the same objection, if your Honor please; no proper foundation for an impeaching question of that sort addressed to this witness based upon a record such as counsel is using.

Mr. Geisler: Withdraw that question and say:

Q. Your recollection now being refreshed by what I read to you, do you recall the fact whether you had any confidential communication with Mr. Gerlinger regarding lumber carriers?

A. Yes; I recall now confidential conversation with Mr. Gerlinger regarding a lumber carrier which he figured on building.

Q. And the confidential communication with regard to these lumber carriers came from Mr. Gerlinger; is that right? A. Yes. [645]

Q. In inspecting the plaintiff's hydraulic lumber carrier at Clark & Wilson in 1923, as I understand your occasion, or the occasion for your going to the Clark & Wilson Lumber Company, was to service the hydraulic lumber carriers which the Clark & Wilson Lumber Company still had or were

(Testimony of Gustav A. Grab.)

using, I should say, which they had bought from the plaintiff?

A. Yes, to the best of my recollection.

Q. On those servicing trips isn't it a fact that you often were accompanied by Mr. Dimick, who was also working for the plaintiff company?

A. I do not specifically recall. It is, however, possible that Mr. Dimick accompanied me on some occasions.

Q. And you both went to the Clark & Wilson Lumber Company for the purpose of servicing the plaintiff's hydraulic lifts?

A. If Mr. Dimick accompanied me at any time he probably went along as my assistant to fix up the broken down Gerlinger carriers.

Q. Now you would not say that Mr. Dimick did not go with you at any of those times, would you?

The Master: He has not said that. He said it is possible that he did.

Mr. Geisler: I didn't quite get that. Thank you.

Q. Did you talk to Mr. Dimick about this Ross carrier and its construction that you saw there at the Clark & Wilson Lumber Company?

A. It has been a long time since and I may have and I may not have. I can't say.

Q. Mr. Ballantyne was the secretary-treasurer of the plaintiff company, was he not?

A. Yes.

(Testimony of Gustav A. Grab.)

Q. Did you talk to Mr. Ballantyne about this particular Ross carrier that you saw at the Clark & Wilson Lumber Company?

A. Not that I recall. [646]

Q. And the only person that you talked to about this lumber carrier, according to your statement, is with Mr. Gerlinger, or to Mr. Gerlinger; is that right?

A. I can't say that. I, however, will state that I specifically recall talking to Mr. Gerlinger on various occasions about the stop mechanism on this particular Ross carrier.

Q. Mention one of the times and places when you talked to Mr. Gerlinger about this particular Ross carrier.

A. As to the particular time, it was after I saw the carrier, the Ross carrier, at the Clark & Wilson Lumber Company, and I talked to Mr. Gerlinger about the features mentioned heretofore primarily at his home and at his private office.

Q. Do you remember the time that that was approximately, what year?

A. On account of the cough I didn't get the entire question. Pardon me.

Q. Do you remember what year that was?

A. Beginning 1923.

Q. At the beginning of 1923?

A. No. I say, beginning 1923; from 1923 on.

Q. What was the date of your first conversation with Mr. Gerlinger about this Ross carrier?

(Testimony of Gustav A. Grab.)

A. I can't fix the exact date. However, I can say it was immediately after I saw the Ross carrier at the plant of the Clark & Wilson Lumber Company, which was shortly after the fall of 1923.

Q. Then you are positive, according to your statement, that you did talk with Mr. Gerlinger about this Ross carrier?

A. Yes, very positive.

Q. And you have distinct recollection of talking with him about it? A. Yes, I do.

Q. But you have no distinct recollection about talking concerning this Ross carrier to any other person in the plaintiff's [647] shop or office?

A. No, I do not.

Q. And you are positive that the Ross carrier which you saw had automatic lift control, including a brake for the lifting devices, of a straddle type lumber carrier? A. Yes.

Q. And that those were substantially the same as the control for automatic lifts which were adopted by the Willamette-Hyster Company and used in the building of their lumber carriers?

A. Yes, they were substantially the same.

Q. Now you could not possibly be mistaken as to the construction of that Ross lumber carrier, could you? A. No.

Q. You are just as sure about that, that is to say, having seen the automatic control of a load

(Testimony of Gustav A. Grab.)

lifting device in the Ross carrier as you are of sitting in that chair where you are at the present time; is that right? A. Yes, I am.

Mr. Geisler: I call for Plaintiff's Exhibit 51, please.

Q. I will ask you to look at Plaintiff's Exhibit 51, being the file wrapper which was the initiation of—at least, the file wrapper of the application for patent which matured in Mr. Grab's patent No. 1,838,939, dated December 29th, 1931. I show you a photostatic copy of the application in that case, in that application of the petition; the first would be the petition. Pardon me just a minute. The petition with power of attorney; is that your signature there—a photostatic copy of it?

A. Yes, it is.

Q. Now I turn to the petition in that file wrapper; it is on page 12 of the same; is that a photostatic copy of your signature? A. Yes.

Q. Now I call your attention to page 13 of that file wrapper, which is the oath appended to that application, and ask you to state whether or not that is a photostatic copy of your signature?

A. Yes. [648]

Q. Now I would ask you to turn to page 4 of that file wrapper and read therefrom the statement beginning with line 7 as appearing in that application.

Mr. Fryer: If the Court please, this is again an exhibit to which we have our standing objection,

(Testimony of Gustav A. Grab.)

that under the well recognized authorities it has no place whatsoever in this record. Unless there is some purpose of impeachment here with respect to a document contained in this file wrapper the entire inquiry is wholly beyond the scope of the issues in this case, and according to a long line of well settled authorities the file wrapper of a patent on this machine has no materiality or relevancy, or place whatsoever in the record of an action brought for the infringement of another patent against the machine on which that file wrapper was taken out. An illustration of that law is found in a recent decision of the Circuit Court of Appeals for the Second Circuit in *American Metal Cap Company vs. Anchor Cap & Closure Corporation*, 20 Federal (2nd) 725, the particular place referred to being page 727. In that case an effort was made to use the file wrapper of a patent on the defendant's machine in support of the plaintiff's contention that the defendant's machine infringed.

The Master: Mr. Fryer, your objection may be well taken to a subsequent question. This question is merely asking the witness to read the particular lines, not to read them out loud.

Mr. Fryer: I thought the question was to read it into the record.

The Master: No.

Mr. Fryer: Oh, well, if it is not to read it into the record, then of course my objection is premature and I will withdraw it.

(Testimony of Gustav A. Grab.)

The Witness: May I hear the question again, please?

(Last question read.) [649]

Mr. Geisler: I am going to ask, your Honor, that the witness be permitted to read aloud from that file wrapper.

Mr. Fryer: Then I will ask leave to present my objection, if I may have just a moment, if your Honor please.

Now, if the question as modified by counsel calls for the reading into the record of any portion of this file wrapper on a patent obtained by someone connected with the defendant, and a patent which evidently plaintiff relies upon as having some relationship to the charge of infringement, we object to it on the ground of the rule which I have referred to and the rule in the case that I have just mentioned. The pertinent portion of that decision, which I say is one in which such a question as the admissibility of such a file wrapper as this was raised, reads as follows:

“Hence, we have no hesitation in holding that claims 2 and 4 are not infringed. So far as the defendant has taken any of Hammer’s inventions, it has taken from him earlier disclosure.” —that was the patentee’s disclosure. Now comes the part dealing with the file wrapper on the defendant’s structure. The Court said: “The validity of its own patent, and the representations by which it

(Testimony of Gustav A. Grab.)

was obtained, are altogether irrelevant. They are not estoppels.”

And that recent example of the well settled rule that the file wrapper on a defendant's machine is wholly irrelevant to any issue is a suit brought for infringement on another patent by that machine.

The Master: Well, I don't think the courts have gone so far as to say it is never relevant, because it might contain a recitation of fact which would be entirely relevant.

Mr. Fryer: Not in as far as the representation was made to the Patent Office as a reason for granting a patent on the defendant's machine. There is no case in the books where any file wrapper on a defendant's machine, I believe, has been held material and relevant for that purpose. [650]

The Master: What line was that? I want to see what this is and then I will be in a position to rule.

Mr. Geisler: It is on page 4, beginning with line 7. There are two very important reasons why this is very pertinent. One of the reasons I prefer not to state in the presence of the witness.

The Master: Now, this is line 7 on page 4?

Mr. Geisler: Yes, begins with the words “this application——”

The Master: “This application is substituted for application Serial No. 207873——”?

(Testimony of Gustav A. Grab.)

Mr. Geisler: Yes, then proceeding from there on.

The Master: For how far?

Mr. Geisler: Stating the objects. The other matters I shall refer to presently.

The Master: I am going to permit this to be read into the record at this time, Mr. Fryer, and shall ask you to make a motion to strike after counsel has reached and passed what he thinks is the material part of it. I cannot pass on that at this time.

Mr. Fryer: Very well, your Honor.

A. May I have the question, please?

The Master: Do you want him to read aloud from page 7, to what?

Mr. Geisler: Pardon me, your Honor, just a moment. That is on page 4 of that file wrapper, beginning at line 7 and reading down to line 31.

The Master: All right, you will do so.

A. "This application is substituted for application Serial No. 207873, filed July 22, 1927, and the invention relates generally to traversing hoists and particularly to a special form of lifting mechanism whereby loads may be picked up or lowered.

"The first object of this invention is to provide a [651] special form of lifting mechanism for traversing hoists which can be operated from the hoisting engine independently of any other duties which such engine is performing.

(Testimony of Gustav A. Grab.)

“The second object is to provide a dry transmission for the lifting mechanism to eliminate the undesirable scattering of oil over the lumber or other material being handled.

“The third object is to provide an exceedingly quiet and smoothly operating lifting mechanism which will require only a minimum application of hand power from the operator to control the lift which is locked in any position it is moved by the operator.

“The fourth object is to so construct the lift that the clearance between its upward and downward driving positions is exceedingly small, thereby making large level ratios possible.

“The fifth object is to so construct the drive that there will be no danger from wearing flat spots on the friction element.

“The sixth object is to provide a plurality of automatic stops for the lifting mechanism which will disengage same in either its upward or downward limit of travel, without load, and in its upward limit of travel, with load.

“The seventh object is to combine the load stops to the load binding mechanism.”

Q. Now will you please turn to page 12, beginning at line 2, commencing with “8. In a traversing hoist,” and so forth.

A. “8. In a traversing hoist, the combination of a wheeled frame having a load lifting mechanism

(Testimony of Gustav A. Grab.)

provided with a reversible friction thereon; an upper limit stop having connections to said friction drive whereby the lifting action shall be stopped when said lifting mechanism has reached its uppermost limit without a load.

“In a traversing hoist, the combination of a wheeled frame having a load lifting mechanism provided with a reversible [652] friction drive; and a downward limit stop whereby the downward travel of said load lifting mechanism shall be stopped when it reaches its lowermost limit of travel without a load.

“In a traversing hoist, the combination of a wheeled frame having a load lifting mechanism mounted thereon; a reversible friction drive for said mechanism; and a spring loaded yieldable load engaging the stop mechanism mounted on said frame whereby said friction drive will be released when the top of a load has reached its uppermost limit of travel.

“In a traversing hoist, the combination of a wheeled frame; a load lifting mechanism on said frame; a reversible friction drive for said mechanism; a plurality of stop means for disengaging said friction drive in a manner to stop the operation of said lifting mechanism when same reaches the upper or lower limit of travel without load or its upper limit of travel with load.”

(Testimony of Gustav A. Grab.)

Q. Now, those are the claims contained in your application when you filed the same with the Patent Office, is that right?

A. Yes, they are apparently some of the claims.

Q. Now, going back to the Ross carrier, the mechanism for limiting the uppermost travel of the load lifting devices is operated without any load being carried by the carrier, is that right?

A. Yes, that is right.

Q. Now, will you please explain why it was that you stated under oath in this patent application that you invented the mechanism described in claim number 8, for example, reading, "In a traversing hoist, the combination of a wheeled frame having load lifting mechanism provided with reversible friction drive thereon; an upper limit stop having connections to said friction drive whereby the lifting action shall be stopped when said lifting mechanism has reached its uppermost limit without a load"—please explain how it was that you made claim to such [653] an invention, when you had, as you stated previously, seen and knew of a construction in the Ross carrier which, as you state, is identical with the mechanism which is described by said claim 8?

Mr. Fryer: We object to that question, if your Honor pleases, as misquoting the testimony of the witness. The witness did not make any such state-

(Testimony of Gustav A. Grab.)

ment as is contained in the last few words of that question, and I will ask to have it read.

(The question was thereupon read.)

Mr. Fryer: Now, the last statement was never made by this witness. The question misquotes him and is misleading in that respect.

The Master: I think his testimony was substantially——

Mr. Fryer: Not even so. He made no reference to claim 8 as describing the claim 8 of the carriers of the defendants here accused as an infringement, and that is what the last part of the question implies.

The Master: I don't think I get your point. Will you state it.

Mr. Fryer: The question as it reads implies that the witness has stated that the defendants' Willamette carrier contains the combination described in claim 8 of the file wrapper which is now lying before the witness, whereas the witness has never stated at any time or intimated that the accused machine in this case contains the combination described in claim 8 in the file wrapper. On the contrary, he has positively stated that **this defendant** never at any time within six years prior to the filing of this suit made a machine containing the combination of that patent whose file wrapper is now before him, and the question assumes that very fact which the witness has specifically denied.

(Testimony of Gustav A. Grab.)

The Master: Well, perhaps I misunderstood the witness, but I understood him to say on his testimony—and I would like [654] to be corrected if I am mistaken about it—that in the Ross carrier it contained a frame with a load lifting mechanism, and that it had—I don't know whether he used the words “reversible friction drive”, but it used language which described the same thing—with a limit stop which had connections to the driving mechanism whereby that lifting action was stopped when the lifting mechanism had reached the upper limit.

Mr. Fryer: Quite true, Your Honor, but that is not what this question calls for. This question calls for what claim 8 in this file wrapper describes, which is not the mechanism Your Honor has just recited. In other words, the claim cannot be held up in thin air wholly disassociated from the application which is made and have any meaning whatsoever, according to all the laws in the books. This question asks this witness something about claim 8 in the file wrapper and assumes that he has said that certain mechanism comes within claim 8. Now, this witness has not tried to interpret claim 8 in the file wrapper and state what mechanism comes with it and what does not. And a mere recitation of parts is no proof whatever what that list of parts described in claim 8 defines, so that the question as put calls upon this witness for an interpretation of the claim 8 in the file wrapper which he has not yet

(Testimony of Gustav A. Grab.)

assumed to make. True he has stated that the Ross machine contains a certain number of enumerated parts but that is not a statement whatsoever by this witness that the Ross Machine contains the claim 8 in the file wrapper, because that is something separate and apart from anything that this witness has yet stated in his testimony. The parts in the Ross machine as a mechanical proposition are one thing, what claim 8 of this file wrapper before the witness means is a wholly different and separate thing, and the parts referred to in this claim 8 of the file wrapper, being a claim in a foreign, unrelated application may be a wholly different list of things from the parts in the Ross carrier which this witness has heretofore adverted to. [655]

Now, the vice in the question is that it assumes that point which I there deny, it assumes that the parts in the Ross carrier which your Honor has enumerated are the parts recited in claim 8 of this file wrapper, and it is that assumption which is the vice of the question. The witness has not so stated. He has recited the parts contained in the Ross carrier as one separate proposition. He has never said what are the elements of claim 8 of this file wrapper in that one particular application, defined as it must be in accordance with the disclosure of that application, and yet the question assumes that he has stated that the definition in claim 8 of the file wrapper before him is the same thing as he has

(Testimony of Gustav A. Grab.)

talked about previously when he has described a combination of parts in the Ross carrier, and it is that vice in the question we object to, and on that ground we contend it is misleading and assumes facts not testified to and is not proper.

The Master: I think for the time being I shall overrule the objection. I have a serious question in my mind as to whether or not this is proper cross-examination, as it has reference to the file wrapper, but I am reserving ruling on that and I will hear from counsel later. I am under the impression that the authorities, at least a number of them, hold as counsel has indicated. I think we had that up in the—not the Dailey case, but—well, the name of the case is immaterial right now, but I am going to permit him to answer this question and I will consider the whole matter as to the propriety of examining upon this file wrapper at a later time, and counsel have leave to renew their motion to strike.

Mr. Fryer: Very well, Your Honor.

Mr. Geisler: And at that time, Your Honor, I shall go more deeply into the subject.

The Master: Yes, of course. I am not foreclosing, or stating any opinion. [656]

Mr. Geisler: Yes. I might state at this time I have no objection to the witness listening in, that in part the main purpose, as presented, the question is presented here for the purpose of testing the veracity of the witness. Here on one statement, both

(Testimony of Gustav A. Grab.)

under oath, he says that the construction of the Ross carrier was in substance like the stop limitation, the limiting means, controlling means, employed in the device built by the Willamette-Hyster Company, and it is further connected that the Willamette-Hyster Company straddle truck is substantially as shown in this picture which we have here on the chart of Mr. Grab's patent. Now, the question I would like to have some information on is how he could make claim to those particular features, that is to say, a stop so contrived as to limit the rise of the load lifting mechanism not dependent upon carrying any load.

The Master: I am permitting you to go ahead.

Mr. Geisler: Yes, Your Honor. I mean that is aside from the question as to what bearing the file wrapper may have otherwise. Now, there is another point in connection with that. The invention is a question of fact, Your Honor. It may be that this is an original question, but in any case cause may arise away from the original question. Invention is largely a question of fact. When the examiner in the Patent Office passes on it it is giving his expert opinion on the question of fact whether in his judgment the thing is not patentable or if it is distinguishable or not distinguishable from a prior art, and I think that has bearing on it; but I believe so as not to delay the procedure here, we will pass that up for the time being and I will ask that the wit-

(Testimony of Gustav A. Grab.)

ness be instructed to answer the question, at least requested to answer the question, and I ask the reporter kindly to read the question so the witness may know it.

The Master: You will read the question to the witness and he will answer it. [657]

(The question was thereupon read.)

Mr. Geisler: May I change a word, Your Honor, "identical" to "substantially"?

The Master: Yes, "substantially the same,".

A. The mechanisms and features referred to are just portions of an entire combination which I applied for patent on. I passed the general information on to my patent attorney to the best of my ability and gave him power of attorney to put it into legal form, and I feel that—I personally feel that these items I am asked about are only a part of a combination including numerous other parts and mechanisms which I at that time considered new and an invention.

Q. (By Mr. Geisler) Now, Mr. Grab, you have been testifying here regarding other patents for quite a while in this case, have you not?

A. Yes.

Q. And you understand patents pretty well, do you?

A. I understand mechanical features of the patents as they are described and shown in the drawings of the patents.

(Testimony of Gustav A. Grab.)

Q. Now, going back to claim 8, you may read it to yourself and explain to the Court if there is anything in that claim in your application for patent on your patent which matured—plaintiff's Exhibit 47—state whether there is anything in that claim which you do not understand?

Mr. Fryer: With respect to this line of examination, if the Court please, merely to preserve our record, we wish to object on the ground that this is not cross examination. We have no objection to counsel going into it, but we wish to take advantage of the rule I previously cited that in doing so counsel makes the witness his own. This witness has not been asked to construe any claim in his direct examination. His testimony bearing upon that subject in final analysis amounts merely to this, he has stated that certain language [658] on a document is copy of other language which he saw in a patent. That is as far as he has been asked to talk about a claim on his direct examination. The remainder of the examination has been very carefully and exactly confined to a discussion of mechanism and parts defined in certain language. He has not been called upon to construe the scope of any claim. So that this cross examination is now calling upon him to exercise the legal function of construing a claim as such and exceeds the scope of the direct examination, and for that reason we make our objection in order to take advantage of the rule I have heretofore called to the Court's attention.

(Testimony of Gustav A. Grab.)

The Master: The objection will be overruled. The question is whether there is anything in that language which he does not understand.

Mr. Fryer: The language, Your Honor, is a claim, which is a matter calling for a legal conclusion that is our objection.

The Master: Yes, but in your direct examination you were asking him as to whether or not he found in these various devices this element, this element, this element, which were themselves individually the language of claims of the patent in suit and which in the whole were the claim of the patent in suit.

Mr. Fryer: The language in my question, Your Honor, but——

The Master: Yes, all right, but if he answered that question he had to construe the language.

Mr. Fryer: He did not construe the claim, we still contend, Your Honor. That is still our position.

The Master: Very well, you may proceed to answer.

A. May I hear the question again, please?

(The question was thereupon read.)

A. I understand the wording, or I understand the claim literally. [659]

Q. (By Mr. Geisler) You read the application, the specification of your application for patent, before signing the same, did you not?

A. Yes.

(Testimony of Gustav A. Grab.)

Q. Have you any further explanation to give why you made the claim there contained in claim 8 of your patent? A. No.

The Master: Is this an appropriate time for recess, or do you have some questions you prefer——

Mr. Geisler: I just have one more question, Your Honor, and then I——

The Master: All right, go ahead. Go ahead.

Mr. Geisler: Yes, thank you. Isn't it a fact, Mr. Grab, that you were discharged from the employ of the plaintiff corporation about January 1st, 1926?

A. Yes. Mr. Gerlinger discharged me after having some words, but at the first opportunity he told me he was sorry he blew up at the time and I should have known better than to take him by his word, as he was not responsible for what he said since he was sick at that time.

The Master: We will recess for five minutes.

(A short recess was thereupon had, after which proceedings were resumed as follows:)

Mr. Geisler: No further questions, Your Honor.

Redirect Examination

By Mr. Fryer:

Mr. Fryer: May I have Exhibit 76, if the Court please?

The Master: Seventy-six?

Mr. Fryer: It is that red folder,—at least, one page in the red folder.

(Testimony of Gustav A. Grab.)

The Master: Oh, yes.

Mr. Fryer: Will you hand it to the witness, please? Will [660] you state whether or not the entire folder of which the page Exhibit 76 is a part is an advertising folder referred to in your testimony and put out by the defendant Willamette-Hyster Company? A. Yes.

Q. Did you personally have anything to do with the preparation of the entire subject matter contained in this folder?

A. Yes, I arranged for all the photographs and wrote all the copy in this folder.

Q. Will you state whether or not the various representations of carriers contained in the folder doing different sorts of work truly and correctly represent the usual and customary work performed by those carriers? A. Yes.

Mr. Fryer: We now offer in evidence the remainder of the folder in which Plaintiff's Exhibit 76 is contained and ask that it be marked Respondents' Exhibit 77.

Mr. Geisler: No objection.

The Master: It will be so marked.

(The portion of the folder referred to was thereupon received in evidence and marked Respondents' Exhibit 77.)

Q. (By Mr. Fryer) Will you now look at pages 18 and 19 of the folder Exhibit 77 and explain what operation with a Willamette carrier is shown in that photograph?

(Testimony of Gustav A. Grab.)

A. It is an end-lift operation.

Q. When you say "end-lift" do you mean that the machine which is there lifting a load is capable of lifting a load only by a lift across its front end?

A. No, this machine is also capable of straddling a load and carrying it underneath, and the operation pictured is an end-lift operation.

Q. Will you now refer to page 32 of Exhibit 77 and state whether [661] or not you find on that page any illustration of the capacity of the Willamette-Hyster carrier to perform both the function of straddling a load and lifting a load by means of an end-lift?

A. Yes, the carrier pictured on the top of page 32 has a load across one end as well as a load underneath.

Q. Will you describe what the operation immediately below the one you have just described is on page 32 of Exhibit 77?

A. Pardon me, I didn't get the entire question on account of some noise.

Mr. Fryer: May I have the question read, please?

(The question was thereupon read.)

A. It also is an end-lift operation. However, it is the same carrier as the one pictured above, which is also capable of handling a load underneath.

Q. Now, will you describe what the operation is that is shown in the upper portion of page 33 of Exhibit 77?

(Testimony of Gustav A. Grab.)

A. It is also an end-lift operation with a combination end-lift and straddle type carrier.

Q. On the face of Exhibit 77, which is in evidence as Plaintiff's Exhibit 76 reference is made to high piling. Will you point out what if anything is contained in Exhibit 77 to illustrate the high piling there referred to?

A. Photographs shown on pages 28, 29, 30, 31, 32 and 33.

Q. In that high piling being done with a lift truck exclusively or with a truck capable of operation both as a straddle truck and as a lift truck?

A. It is with a truck or carrier capable of operating as a lift truck and as a straddle type truck.

Q. Will you state whether or not in your experience in the carrier business you have found anything in the construction of an ordinary lift truck which renders it unsuitable or unpractical for use in a straddle truck? [662]

A. I have not.

Q. Will you state whether or not in your experience you have found that the mechanisms employed in a lift truck are to any extent interchangeable with mechanisms employed in straddle trucks?

A. Yes, they are. In fact, we are doing so right along in our regular manufacture of carriers.

Q. I call your attention to pages 20 and 21 of the exhibit 77, in which the carriers are shown hauling varieties of products, such as pulp, lime rock, sulphur, and other materials. Will you state

(Testimony of Gustav A. Grab.)

whether or not those are all usual and customary purposes for which carriers of this type are employed?

A. These photographs are photographs of carriers and their actual operation, and we have a number of carriers employed in various operations doing the same type of work as that pictured on these two pages.

Q. In your experience in the carrier business have you found that the characteristics of a carrier suiting it for use in handling lumber render it unsuitable for use in handling other products?

A. No.

Q. Will you state whether or not in the carrier business you have found that a carrier in order to be sold in the lumber trade must also be a carrier suitable for handling all sorts of products?

A. Yes.

Q. Have you found in your experience in the carrier business, or have you not found, that the characteristics of a so-called lift truck in any way affect or detract from its adaptability for handling lumber? A. No.

Q. Is a lift truck adapted or unadapted for use in handling lumber?

A. It is adapted and sold in many cases for the specific purpose of handling lumber only. [663]

Q. Do you find in your advertising circular Exhibit 77 a lift truck illustrated as handling lumber

(Testimony of Gustav A. Grab.)

only?—and by lift truck I mean one which is not also a straddle truck.

A. Yes. I do, in the lower left-hand corner of page 32.

Q. Will you state whether or not a lift truck such as shown in the lower left-hand corner of page 32 of Exhibit 77 is useful and is actually employed for tiering lumber in various industrial operations?

A. Yes, it is.

Q. Will you state whether or not there is any thing in the hoisting mechanism or the controls therefor in a carrier which in any way affects the rate of speed at which that carrier can travel over the surface of the ground?

A. No, there is not.

Q. Do you recognize any relationship whatsoever between the road speed of a carrier and the particular type of lifting mechanism or controls therefor employed in that carrier?

A. No, I do not.

The Master: Let me hear that last question.

(The last question and the answer thereto were thereupon read.)

Mr. Fryer: The road speed of—pardon me, Your Honor.

The Master: All right.

Q. (By Mr. Fryer) The road speed of a carrier is determined entirely by the motor speed and the transmission mechanism between the motor and the drive wheels of the carrier, is that right?

(Testimony of Gustav A. Grab.)

A. That is right.

Q. Does the hoisting mechanism have anything to do with the propulsion of the carrier along the road in any of your products?

A. No, it does not.

Q. Is that true of all carriers in your experience? A. Yes to my best knowledge. [664]

Mr. Fryer: We now offer in evidence a copy of the Ross patent 1209209, issued on December 19, 1916, and ask that it be marked Respondents' Exhibit 78.

(The patent referred to was thereupon received in evidence and marked Respondents' Exhibit 78.)

Q. (By Mr. Fryer) Have you a copy of the Ross patent 1209209 before you, Mr. Grab?

A. Yes, I have.

Mr. Geisler: Those patents, if your Honor please, are merely with regard to prior art, is all, and not cited.

The Master: I take it that they are being offered as showing the state of the prior art.

Mr. Fryer: Yes, Your Honor, just to show the antiquity of the idea of a straddle truck for hauling different types of products.

Q. (By Mr. Fryer) Have you heretofore read and examined the Ross patent 1209209, Respondents' Exhibit 78? A. Yes, I have.

Mr. Fryer: At this time we also offer in evidence a copy of patent number 537628 to Boudinot,

(Testimony of Gustav A. Grab.)

granted April 16, 1895, and ask that that be marked Respondents' Exhibit 79. This patent also is offered to show the antiquity of a straddle truck as a means for conveying lumber.

(The patent referred to was thereupon received in evidence and marked Respondents' Exhibit 79.)

Q. (By Mr. Fryer) Have you before you, Mr. Grab, a copy of the Boudinot patent offered in evidence as Respondents' Exhibit 79?

A Yes, I have.

Q. Have you heretofore read that patent?

A. Yes, I have.

Q. Will you state whether or not, with the structure of those two straddle trucks before you, you as a mechanic would have [665] any difficulty in installing in said trucks the hoisting mechanism and controls therefor found in the Dingee patent?

A. No, I wouldn't have any difficulty to do so.

Q. Would the Dingee patent suggest to you the idea of doing so, if you had in mind the construction of a vehicle for transporting lumber?

A. Yes, it would.

Q. I believe you have stated on your cross examination that the patents to Dingee, French, Nicholson, Towson and Carr did not suggest to you a lumber carrier. Will you state whether or not you meant by that assertion, if you made it, that none of those elevator mechanisms are suitable for carrying lumber?

(Testimony of Gustav A. Grab.)

Mr. Geisler: I think that is rather leading, if your Honor please.

The Master: I think it is. Sustained.

Mr. Fryer: May I have the answer for the record, if your Honor please?

The Master: You may. Read the question to the witness, if you will.

(Last question read.)

The Master: My ruling was wrong there. The objection will be overruled.

A. I either misunderstood the question or I erred when I made that statement. I now wish to state that all those devices are adapted for carrying lumber.

The Master: You mean for carrying lumber, or for lifting and lowering lumber?

A. For lifting, lowering and carrying lumber.

Q. (By Mr. Fryer) What is your understanding of the character of a load of lumber, for instance, which is shown on the load lifting means of the French patent in Figure 1 of that patent?

A. The load shown in Figure 1 of the French patent may well be a load of lumber. [666]

Mr. Fryer: May I now have Exhibits 71 to 75, please?

Q. I will now ask you to look at the photographs, Exhibits 72, 73, 74 and 75 and state whether or not the use being made of straddle trucks as shown in those photographs is the only way in which straddle trucks are used in the handling of lumber.

(Testimony of Gustav A. Grab.)

A. No. The method shown, or the particular use shown, is only a small portion of the way of handling lumber in a lumbering operation.

Q. Will you state whether or not from your experience in the carrier business the scenes represented in the photographs, Exhibits 72, 73, 74 and 75, portray the only way in which lumber is ever handled by the use of straddle trucks?

A. No, they do not.

Q. Will you state whether or not various other and different ways of handling lumber are encountered in the usual operation of lumber yards and mills besides those shown on Exhibits 72, 73, 74 and 75? A. Yes, they are.

Q. Is it your understanding that in the operation of the Nicholson construction the load lifting means in the normal operation of the machine is operated while the portion of the frame in which the load lifting means moves is inclined from the vertical? A. No, it is not.

Q. Will you state what your understanding is of the operation of the Nicholson machine when the load lifting means and the frame in which it is supported is inclined from the vertical?

A. The load lifting means and power transmission means to the load lifting means cannot function when the frame structure is in the dotted line position. The purpose of placing the frame structure into the dotted line position is to facilitate the

(Testimony of Gustav A. Grab.)

moving of the structure where there are low overhead clearances and not for operating the mechanism in this dotted line position. [667]

Q. In other words, then, the dotted line position shown in Figure 1 of the Nicholson patent is one which is resorted to solely when the machine is transported from place to place and not when it is the object to transport a load of material from place to place; is that your understanding?

A. Yes, that is right.

Q. You have referred to a bolster in your cross examination. Have you anything by which you could explain what you mean by the term bolster?

A. Yes. I have a drawing or cut showing a bolster and the way it is used in our catalogue, Exhibit No. 76.

Q. 77 I believe it is. A. Yes, 77.

Q. 77 is the entire catalogue, Mr. Grab.

A. Pardon me; 77, on page 34 of this catalogue.

Q. Is the part shown in that drawing indicated in any way?

Q. Yes; it is shown in solid black, with the name "Bolster" in white thereon.

Q. Will you state whether or not any of your visits to the Clark & Wilson Lumber Company's plant, about which you have testified, were made by you unaccompanied by Mr. Dimick?

A. Yes, numerous ones.

Mr. Fryer: Now I have just one more question I would like to ask the witness, which is not redirect,

(Testimony of Gustav A. Grab.)

your Honor, if I may have the Court's leave to do that.

The Master: You may.

Q. (By Mr. Fryer) During the time that you have been with the Defendant Willamette-Hyster Company, or its predecessors in business, how much in round numbers is the total gross sales of carriers having the construction generally of the defendant Clark & Wilson's Willamette carrier?

A. Well over two million dollars.

Mr. Fryer: No further questions, your Honor.
[668]

The Master: Any recross?

Mr. Geisler: No recross, your Honor.

The Master: You may be excused.
(Witness excused.)

The Master: Call your next witness.

Mr. Fryer: The defendants rest, your Honor.

The Master: Any rebuttal?

Mr. Geisler: Yes, your Honor. Call Mr. Dickson.

REBUTTAL

JOHN DICKSON

was thereupon produced as a witness in behalf of the plaintiff herein, in rebuttal, and, having been

(Testimony of John Dickson.)

first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisler:

The Master: State your name and address.

The Witness: John Dickson; 1917 Northeast Fremont, Portland, Oregon.

Q. (By Mr. Geisler) Mr. Dickson, what is your occupation?

A. I am master mechanic for the Spokane, Portland & Seattle Railway.

Q. What experience have you had with mechanical constructions?

A. Well, after coming out of school I went to serve a machinist apprenticeship and was foreman of airbrake repairs for the Great Northern; I was draftsman for the Great Northern. I left the Great Northern Railway and was instructor for two years at the Mechanical Art High School, St. Paul, Minnesota. I left there to go as general airbrake instructor on the Great Northern Railway. I left that position to install machinery in the Everett shops for the Great Northern, was then superintendent of the shops, was promoted from there to master mechanic of the Dakota [669] Division of the Great Northern Railway; was transferred to the Spokane, Portland & Seattle Railway as its first master mechanic when it opened up. Since being with the Spokane, Portland & Seattle Rail-

(Testimony of John Dickson.)

way I was promoted to superintendent of motive power, and now I am in charge of mechanical and electrical departments of the railway, including the Oregon Electric.

Q. You may state whether or not in your work you have had occasion to read patents, study patents.

A. Yes, sir, I have.

Q. Have you taken out any patents of your own?

A. Yes, sir, I have.

Q. I show you here the patent issued to Carr, No. 1,407,124, dated February 21, 1922, on elevator truck, being Defendants' Exhibit 69. Are you familiar with that patent, Mr. Dickson?

A. Yes, sir.

Q. Would you please describe briefly the purpose of that patent, I mean the devices described in it and the work they do?

A. This is an end lift——

Q. A little louder, kindly, Mr. Dickson, so the Court can hear you.

A. This is an end lift truck. It is operated by a screw, which is centrally located between two columns. It has a fulcrum and nut on the screw. The fulcrum is connected with a lever or arm which has a roller on each side of it, or a roller with bars, one on each side of the column, and as the screw is operated the nut is raised, which carries the platform with it. The screw is operated with a worm, a wheel—through a wheel—a gear on the bottom of

(Testimony of John Dickson.)

the screw, and that worm is driven by a motor which is connected to the shaft that drives the worm. On the mobile part of it it has a separate motor which moves the truck back and forth. It is equipped with a brake, and the brake is operated by stops on a vertical rod, one on top and one [670] on bottom of the vertical rod, which come in contact with rollers on the casting that the platform is attached to, so that when the platform is at the bottom it automatically stops the platform from going any further. When it strikes the down or upper side it stops the platform from going any further up. However, it is necessary to throw an electric switch which operates the motor, and the stopping and starting is done through stopping and starting of the motor. It has no clutch that would do this, as the operation depends entirely on the shutting off of the current off of the motor, or the reversing of it. It is designed for an end lift truck. The platform is on one end only, making it a truck purposely designed to raise a single platform. Do you want me to go into the entire details of the building of this thing?

A. No; I just want to get a brief description. Are you familiar with the straddle type of lumber carriers? A. Yes, sir.

Q. You may state whether or not in your opinion this Carr patent gives any suggestions as to how a straddle type of lumber carrier, with lift controls, may be built.

(Testimony of John Dickson.)

Mr. Fryer: We object to the question on the ground that no proper foundation with respect to the qualifications has been made for this question.

Mr. Geisler: He is a mechanic, well versed.

The Master: Well, I don't know whether you have shown that he is familiar with the construction of straddle carriers. I think you asked him whether he knew what they were.

Q. (By Mr. Geisler) Would you please state whether you are familiar with the construction of the straddle type of lumber carriers?

A. Yes, sir, I am.

Mr. Fryer: The same objection. [671]

The Master: Overruled. You may answer. You may ask the question, Mr. Reporter, to which objection previously has been made.

(The second to last question was read as follows: "You may state whether or not in your opinion this Carr patent gives any suggestions as to how a straddle type of lumber carrier with lift controls may be built.")

A. I would say it does not.

Q. (By Mr. Geisler) Have you any reason to advance for your opinion?

A. Well, there are a number of other machines entirely foreign to all of this equipment that would suggest better arrangements than are shown on this patent.

(Testimony of John Dickson.)

Q. By "this patent" you mean the Carr patent?

A. The Carr patent.

Q. Proceed, please. You may go ahead with your answer.

A. For one thing, it lifts only on one end, while a straddle type lumber carrier must lift on all four points. Second, this has no clutch, which I consider is a very necessary thing for quick handling and safety in connection with a straddle type lumber carrier. Those are the main objections that I would have to it.

Q. You may state whether or not in your opinion there is any similarity between a straddle type of lumber carrier and an elevator or wheel-mounted elevator.

A. I do not consider there is any similarity.

Q. Now having reference to the devices which are described in the Carr patent for the control in an automatic manner of the load lifting devices so as to stop them at predetermined elevations in the up or down movement, apply a brake, you may state whether or not in your opinion the devices which are shown there in the Carr patent could be carried over into the building of a lumber carrier. [672]

A. Well, I would say as they are in here they would have to be changed considerably before they could be used for that purpose.

Q. You may state if you were asked to build the straddle type of lumber carrier whether the sugges-

(Testimony of John Dickson.)

tions with regard to lumber lift control shown on the face of the Carr patent would enable you, or would not enable you, to build a straddle type of lumber carrier with a control for the load lifting mechanism.

A. Well, it would not suggest anything to me in the way of parts for a straddle type lumber carrier that I could use, or it wouldn't suggest building a lumber carrier of a straddle type to me, or any part of it, with probably the exception of the construction of the brake itself, the small portion down here on the brake. I believe that could be used anywhere.

Q. Now I would like to call your attention to the patent in suit, Plaintiff's Exhibit 2. I direct your attention to Figure 3 of the patent drawings. Have you studied this particular patent? Have you studied this patent?

A. Yes, sir.

Q. Are you familiar with it?

A. Yes, sir.

Q. Now look at the part designated 65 in Figure 3 of the patent drawings and state what they are, their functions.

A. 65?

Q. Yes, please.

A. 65 is a stop that is fastened to the upper part of the rack bar that has an adjustable screw in it for the purpose of operating the stopping mechanism of the car—of the lumber carrier.

Q. You may state whether or not it stops it merely in one direction.

(Testimony of John Dickson.)

A. Yes. It is the stop for the lower movement of the lumber carrier rack bars.

Q. Now you may state whether or not in your opinion there would be any problem presented for the employment of a similar stop [673] for controlling the upward movement of the lumber carrying devices, the rack bars.

A. Why, I would say not. It would very readily suggest other stops on the same rack bars.

Mr. Geisler: You may take the witness.

Cross Examination

By Mr. Fryer:

Q. What are some of the patents that you have taken out, Mr. Dickson?

A. I invented the lining for a box car. I invented a cylinder cock, an automatic cylinder cock, and an oil circulator for applying to journal boxes on locomotives and cars.

Q. Anything else?

A. I have applied for others but didn't get a patent.

Q. What others did you apply for?

A. I won't say I applied for them. That is, I had searches made, but did not apply.

Q. Will you now name all of the types of mechanisms that you personally have worked on besides these inventions of yours that you have either patented, or thought of patenting?

(Testimony of John Dickson.)

A. They are so numerous that I could hardly mention all of them.

Q. Well for instance, did you ever build an automobile?

A. No, I never built an automobile but I have built, or supervised the building of, motor cars.

Q. In what connection did you do that?

A. In connection with motor cars used for transportation of officials and section foremen on the railway.

Q. By motor cars, then, you mean these power driven cars that move over the rails of a railroad system; is that it? A. Yes, sir.

Q. Did you ever try to build a straddle truck?

A. No.

Q. Did you ever try to build a lumber carrying truck for travel [674] over the highways?

A. No.

Q. Have you ever seen the machine of the Carr patent, about which you have testified, in actual use?

A. No, I have only read the drawings.

Q. In the drawings of the Carr patent the part which you say is a switch is contained in the box 69; is that your understanding? A. Yes, sir.

Q. The patent doesn't give you the details of the construction of whatever mechanism is contained within that box, does it?

A. Well, it does not. The patent doesn't, but we know what it should contain.

(Testimony of John Dickson.)

Q. Your understanding is that it contains any suitable kind of mechanism to turn the power on or off, or to reverse the direction of flow; is that your understanding? A. Yes, sir.

Q. And that is accomplished by working the part 71, which is shown in Figure 8 on the outside of the box backward or forward, in one direction or another; is that right? A. Yes.

Q. And that part 71 on the outside of that box 69, which, when rotated, works the mechanism inside of the box, is in turn pushed one way or the other by the link 72; is that true? A. Yes.

Q. And the link 72 is made to act in that way by the connected linkage consisting of a bell crank lever 73 and a link 74, which connect up with the vertical rod 75; is that your understanding?

The Witness: 73? Say that again, please.

Mr. Fryer: Read the question, please.

(Last question read.)

A. Yes, sir.

Q. Now in your testimony you have referred to a clutch? A. Yes. [675]

Q. As a certain mechanism usable for certain purposes. Did you mean by that a clutch which could be moved by pushing a member in or out?

A. No, sir.

Q. What kind of a clutch did you mean?

A. I meant what the common definition of a clutch is.

(Testimony of John Dickson.)

Q. What is that common definition of a clutch, as you understand it?

A. Well, in mechanics a clutch is a power transmitting device operated by friction or interlocking to secure or brake rotative continuity as between two shafts, or between a pulley and a shaft.

Q. Now in all of those various forms of mechanism which you consider included in that definition of a clutch, what, if anything, is used to connect or disconnect the clutch?

A. Well, there may be various means. Any means either directly connected to the essentially movable part of the clutch is all that is necessary.

Q. And those essential means, I assume, are ones which necessitate some sort of movement from an external source in order to cause the clutch to become either engaged or disengaged; is that your understanding? A. Yes, sir.

Q. As a matter of fact, most clutches are operated by crank or a lever which is pushed to one position or another, to either put the clutch in or out of engagement; is that right? A. Yes.

Q. What is the answer?

A. Yes. I said "yes".

Q. The clutch in an automobile, for instance, is put in or out of engagement by pushing the clutch lever in or out on the footboard of the machine; is that your understanding? A. Yes.

(Testimony of John Dickson.)

Q. Various other mechanisms, whether the clutch is a jaw clutch or a friction clutch, it is customary and usual to employ a handle [676] or other swinging lever which can be pushed in one direction or another to put the clutch in or out of position; is that right? A. Yes.

Q. Now will you tell me what there is in the mechanism of the Carr patent which renders all of the structure therein, which we have just referred to, including the link 72, the bell crank lever 73, the link 74 and the rod 75, which makes those parts incapable of pushing a clutch lever back or forth in order to engage or disengage the clutch?

A. They could be arranged to move a clutch.

Q. If the part 71 on the drawings of the Carr patent, instead of being the handle on an electric controller were the lever of a clutch, is it or is it not your understanding that movement of link 72 would serve to engage and disengage the clutch?

A. If it was arranged to suit the machine that it was to operate.

Q. I don't believe you have answered the question. I will put it again and see if you can answer it directly. If the lever 71 of the drawings of the Carr patent were connected to a clutch instead of a controller, would or would not the link 72 and the connected parts of the Carr drawing serve to operate the clutch connected to the lever 71?

(Testimony of John Dickson.)

A. Yes, if a clutch was on this machine it would.

Q. In other words, if we had a clutch in the box 69 instead of an electric controller, the linkage shown in the Carr drawings comprising that lever 71 sticking out of the box 79, the link 72 and the bell crank lever 73, and so forth, could be made to operate a clutch if a clutch was contained in that box; is that your understanding?

A. A clutch could not be contained in that box, because it is not located properly on the machine to operate.

Q. Well, that may be an interesting problem but it is not the one I asked you about. Now I will ask you to state directly your answer to this question. If in the box 69 there was contained [677] a clutch mechanism, either of the friction or the jaw type, connected to the handle 61 on the outside of that box, will you state whether or not the linkage 72, 73, 74, and so forth, of the Carr patent, would be a suitable linkage to operate the clutch which my question assumes would be located in the box 69?

A. Well, tell me just how the clutch would be connected to those levers.

Mr. Fryer: If your Honor please, I move to strike the answer and have the question read to the witness, which calls for a "yes" or "no" answer and whatever explanation the witness cares to make.

(Testimony of John Dickson.)

The Master: I think the question, Mr. Dickson, is that you are to assume that those levers and this linkage connect with the clutch lever.

Mr. Fryer: Yes; and we assume there is a clutch in the box 69, and that the handle 71 sticking out of the box is the control lever for the clutch; then the question is, will the linkage 72, 73 and 74 be satisfactory to operate the clutch which we assume is in the box, or will it not?

A. Well, I believe I could design them to do that, yes.

Mr. Fryer: I move to strike the answer as not responsive, if the Court please.

The Master: He said "yes".

Mr. Fryer: I didn't hear, your Honor.

The Master: He said "yes".

The Witness: May I explain, Judge?

The Master: Yes. Go ahead.

The Witness: This patent shows dimensions of levers, rods, bell cranks, and so forth, and, as I understand, I am asked whether these as they are would operate a clutch?

The Master: You mean as to size and dimension?

The Witness: Just as they are right in this patent. [678]

The Master: Well, of course, your patent drawing has nothing to do with size or dimension.

The Witness: Well, I could say that they would operate a clutch, yes.

The Master: We will now adjourn until ten o'clock tomorrow morning.

(Whereupon, at 5:06 o'clock P. M., December 1st, 1936, an adjournment was taken until tomorrow, December 2nd, 1936, 10:00 o'clock A. M.) [679]

Portland, Oregon, December 2, 1936

10:05 o'Clock A. M.

(Pursuant to adjournment)

Mr. Geisler: Do you want to cross examine, Mr. Fryer?

Mr. Fryer: No questions.

Mr. Geisler: Call Mr. Paul.

The Master: Mr. Hall?

Mr. Geisler: Paul (spelling) P-a-u-l.

The Master: Mr. Paul.

WILLIAM HOWARD PAUL

was thereupon produced as a witness in rebuttal, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisler:

The Master: State your name and address.

A. William Howard Paul, 25 North 27th Street, Corvallis, Oregon.

The Master: Just take the stand.

(Testimony of William Howard Paul.)

Q. (By Mr. Geisler) What is your business, Mr. Paul?

A. Education.

Q. Where are you employed? Please state fully.

A. I am Assistant Professor of Mechanical Engineering in the Oregon State College.

Q. What experience have you had in the practical use of mechanics, practical application?

A. My experience consists of about twelve years of shop work in automobile maintenance and some ten years' experience on the teaching staff of the College in subjects such as mechanical drawing, in all of the related subjects of heat engineering in the mechanical engineering course, including mechanical laboratory; and then summer work with Portland Gas & Coke Company as refrigeration engineer, worked with the State [680] Highway Department as automotive test engineer, worked with the Pacific Gas Association three summers as draftsman, and worked with the Dallas Machine & Locomotive Works one summer as a designing draftsman.

Mr. Geisler: I would like the witness to be shown the Carr patent, Defendants' Exhibit 69. You may look at that patent and state whether or not you have studied the same.

Mr. Fryer: If your Honor please, at this time we feel compelled to object to this testimony, which is apparently some further testimony solely in the

(Testimony of William Howard Paul.)

nature of expert exposition of matters in the cause. This is the fifth expert witness produced by the plaintiff in this case. The defendants has not produced any so-called patent experts. It has had but one witness in the cause dealing with the patent aspects of the case, and that witness was merely a man skilled in carriers and not a patent man. It is true that the number of experts allowed to a side is a matter within the discretion of the Court, and we submit that in a case of this kind five experts on patent matters far exceeds anything that any court has ever exercised its discretion in permitting. For that reason we object to this as an unnecessary burden upon the defendants, an unnecessary duplication of the record, and a perversion that defeats the true purposes in a hearing of this kind. This subject matter on which the witness is now apparently going to be interrogated about is an exact duplicate of the testimony of the last witness on the stand. Now, that is completely beyond the normal and proper scope of expert testimony, and we object to it on that ground.

Mr. Geisler: If the Court please, counsel misinterprets entirely the nature of what an expert witness is. There are two kinds of expert witnesses, one with regard to plain mechanics, whether the device which is involved can readily be changed or cannot be readily changed with respect to some other device which the defense sets up; and one which in-

(Testimony of William Howard Paul.)

interprets patents. We [681] have not so far called a single witness to interpret a patent, viewed from a mechanical matter,—just as much so as Mr. Grab was called on there to interpret a patent. If there was any patent expert in the case, surely Mr. Grab comes within that category.

Now, in the matter of discretion of the Court, I will state that this witness will corroborate substantially the testimony given by the preceding witness, Mr. Dickson.

Mr. Fryer: Even conceding everything counsel has stated, our objection will still be made on the same ground, but we cannot concede the statements made, and we believe the evidence refutes the statements he has made concerning the nature of the testimony of previous witnesses, and we object to the testimony as not relevant to this cause, for the reasons previously stated.

The Master: The objection will be overruled.

Mr. Geisler: Please read the question, Mr. Reporter.

(The question was thereupon read.)

A. I have.

Q. (By Mr. Geisler) State whether or not you are familiar with the nature of the device described by the patent? A. Yes, I am.

Q. State whether or not the Carr patent embodies a load lift and an automatic control for the same comprising automatic means for limiting the

(Testimony of William Howard Paul.)

movement of lift in either direction and applying a brake simultaneously.

Mr. Fryer: That is objected to as being grossly leading and putting into the mouth of the witness the words that counsel would like him to use in his answer. If this same sort of examination is to be proceeded with the witness should be allowed to state what he finds in the patent and without it being stated by counsel what he finds.

The Master: Overruled.

Mr. Geisler: If Your Honor please,— [682]

The Master: Overruled. Unnecessary—overruled.

(The question was thereupon read.)

A. It does.

Q. (By Mr. Geisler) State what if any experience you have had with lumber carriers of the straddle type?

A. My experience with—my direct experience with straddle type lumber carriers consists of one summer's work, three months, with the Dallas Machine & Locomotive Works, Dallas, Oregon, as a designing draftsman. I have, of course, seen them operate in lumber yards.

Q. State whether or not, in your opinion, lumber carriers of the straddle type and elevator trucks or wheel-mounted hoists of the Carr type belong to the same machine classification?

(Testimony of William Howard Paul.)

Mr. Fryer: We object to that on the ground that no proper foundation has been laid for an opinion on that subject.

Mr. Geisler: The witness is an instructor at the College here, Assistant Professor of Machinery.

The Master: Well, I think that perhaps you had better qualify him a little further as to his knowledge of the classifications of machines and machinery. I shall sustain the objection as the record now stands.

Q. (By Mr. Geisler) Are you familiar with the classifications— State whether or not you are familiar with the classifications of machinery?

A. Yes; in engineering work we have a good deal to do with the classification of all types of machinery, including such things as boilers, engines, and so on.

Mr. Geisler: I ask now that my question now be repeated for further ruling of the Court.

Mr. Fryer: We renew the objection, if Your Honor please, on the same grounds.

The Master: I will permit him to answer. Your objection will be overruled.

Mr. Geisler: Would the reporter please read the question? [683]

The Reporter: (Reading): "State whether or not, in your opinion, lumber carriers of the straddle type and elevator trucks or wheel-mounted hoists of

(Testimony of William Howard Paul.)

the Carr type belong to the same machine classification?"

A. I consider these two types of machines in a different machine classification.

Q. Would the witness please be shown Plaintiff's Exhibit Number 2 of the patent in suit. State whether or not you are familiar with that patent?

A. Yes, I am.

Q. I call your attention to Figure 3 of this patent, and to the part marked 65 in Figure 3, also to the part marked 66, and connected operating parts.

A. Yes.

Q. Please state what the part 65 is and its function?

A. The part 65 is the lower limit stop on the rack bar—I might say, lower limit stop positioned at the upper end of the rack bar.

Q. What is the specific construction of that part 65?

A. The leader here points to the screw——

Q. Figure 3,—I beg your pardon.

A. Are we to consider this assembly consisting of the screw, the lock nut and the arm fastened to the rack bar?

Q. You may describe the assembly as you see it and its operative purpose.

A. I believe it is the intention of the patent to show that assembly, the screw, the lock nut on the screw and the arm fastened to the rack bar.

(Testimony of William Howard Paul.)

Q. What arm do you refer to?

A. Arm 65.

Q. State whether or not, in your opinion, there would be any problem involved in placing of a similar stop for controlling the upward movement of the load lifting means? [684]

A. No, the suggestion is there for an upper limit stop. It is not shown on the drawing as being back of the frame member.

Mr. Geisler: You may cross examine.

Mr. Fryer: We stand on our objection to the testimony of this witness and for that reason are not going to waive it by cross examination.

The Master: That is all.

(Witness excused)

The Master: Any further testimony?

Mr. Geisler: No, Your Honor, we rest. [685]

EXCERPTS FROM FINAL ARGUMENT OF
MR. FRYER, ATTORNEY FOR DEFEND-
ANTS.

(The following matter down to end of Statement of Evidence was put in by Defendants.)

Mr. Fryer: Before presenting the matters which we wish to urge upon Your Honor in behalf of the defendants I feel it incumbent upon me to dispel at the beginning whatever impressions may have been

created by the contention of the plaintiff that the defendants here are bound by solemn admission in the pleadings. I am somewhat disturbed by that contention. It would disturb me greatly to feel that the defendants in this cause have been so far misrepresented by Mr. Flegel and Mr. Aurich and myself that we have come in here and with all the care and attention that we could devote to the pleadings in this case have made a solemn admission admitting the act which the bill of complaint accuses us of committing. It may be that we are so remiss in our duties, I don't know. If we are, then I certainly apply to the Court for the exercise of its settled power or discretion to relieve us from any such inadvertence and to grant us leave to make whatever amendments are necessary in our pleadings to save the defendants from such culpable negligence on the part of their counsel. However, I think that we may not be required to have such indulgence on the part of the Court, because a very brief reading of the pleadings will indicate that they do not need any such amendment to avoid the effect which counsel for plaintiff seeks to place upon them.

In the first place, the pleadings referred to are not sworn statements in the cause. They are mere pleadings signed by counsel, not signed by the parties personally and not under oath.

The admission which I refer to is the one which counsel seeks to bind in connection with the allega-

tions pertaining to the defense of laches. The contention, broadly, of the plaintiff [686] seems to be that if these defendants are to set up the defense of laches it must by force of that position admit commission of the act complained of for a long period of time. That seems to be the underlying theory of his idea which enables counsel to see in these simple and plain pleadings admission of infringement. Well, of course, the fundamental idea underlying that premise is completely erroneous. We do not see anywhere in our pleadings, and we do not contend in this cause, that we have used the combination of the claim in suit for the long period of years which give rise to the defense of laches. In this case the pleadings on behalf of the plaintiff come in and say to us, "We accuse you of using this chair because that chair is covered by our patent." Our pleadings and our position before this court is simply this: "We do not for a moment admit that that chair is covered by your patent, but we do insist that we have used this chair for a long period of years with your knowledge and without protest on your part, and if it does come within the claims of your patent then your claim is barred." Now, that is our position, and that is the position which our pleadings state, as I shall show your Honor very briefly.

Now, in this bill of particulars, which supposedly is a record admission of the act complained of, we were called upon to give further particulars with

respect to the allegation of laches in the answer. The paragraph which counsel seizes upon appears on page 2, under the heading "IX(b), First Paragraph." Now, as a mere matter of grammar and rhetoric that paragraph is not susceptible to the interpretation placed upon it by counsel. It reads as follows:

"The failure of plaintiff and its predecessors, with full knowledge of the facts, to assert any rights in the patent in suit against defendants'"—note the plural—"defendants' carrier or others substantially identical therewith for more than [687] six years prior to suit."

Now, counsel insists that "therewith" can only mean and refer to the invention of the patent in suit, whereas the plain grammar of the language indicates, by reason of the rule that a word like "therewith" must modify the subject closest preceding it, that "therewith" modifies "defendants' carrier" and not anything in connection with the plaintiff's patent in suit. In other words, that was an assertion on the part of the defendants to this effect, that the plaintiff and its predecessors had full knowledge of the particular machines of the defendants which the plaintiff contends infringe his patent. Now, that is no admission that those machines do infringe, and that is an assertion that the plaintiff knew about the machines which he now accuses for a long period of time. And it says that the plaintiff did so with full knowledge of the facts,

he failed to assert any rights under the patent in suit against these accused carriers of defendants or against carriers substantially identical with those accused carriers of the defendants, meaning thereby the other carriers in the trade made by the public at large for many years having the identical construction of the carriers of the defendants said to be an infringement. Now, I think that that language is as plain as it can be in accordance with the ordinary rules of grammatical construction, but if there is any occult meaning in it which is not apparent to the minds of the counsel for defendants, why, then we humbly beg leave of the Court to amend that language and make it as plain as may be necessary to express its obvious intent.

Now, another paragraph which is relied upon as indicating admission of the act complained of is the following one on the same page, and the answer is the same to that. The next paragraph, entitled "IX(b), Second Paragraph", on page 2 of the Bill of Particulars, says: [688]

"The defendant Willamette-Hyster Company and its predecessors in interest in Portland, Oregon, ever since 1924 has expended large sums of money for plant equipment, materials, labor and development work in the manufacture and sale of the carriers alleged to infringe."

Well, now, is there anything in that language that asserts that for that period of time the defendants' carriers have been infringing carriers? I must con-

fess that my knowledge of the English language fails me in importing any such meaning in that language, but again if it does have any meaning not apparent from the face of this document then the defendants certainly ask leave that it be amended and made as clear as may be necessary to clearly indicate that obviously intended meaning.

The Master: Well, upon the matter of any amendment, Mr. Fryer, as I understand the rule, that all applications for amendment must be made to the Court,—the Master has no power to permit any.

Mr. Fryer: I believe that there is law to that effect. I also believe that there are cases in which the master has made amendments. But, in any event, our request is made both to the Master and to the District Court.

The Master: Very well. [689]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

It is hereby stipulated that the foregoing Transcript contains all those portions of the Reporter's Transcript of the Evidence, specifically designated by Plaintiff—Appellant, and by Defendants—Appellees, respectively, as the portions to be contained in the Record of Plaintiff's Appeal from the Final Decree herein, and that the said specific Designa-

tions by the parties of the Transcript of the Evidence may be omitted from the Transcript.

Dated October 16th, 1939.

T. J. GEISLER

Attorney of Plaintiff,

Appellant.

REYNOLDS, FLEGEL & SMITH

Attorneys for Defendants,

Appellees.

[Endorsed]: Filed Oct. 16, 1939. [690]

United States of America

District of Oregon—ss.

CLERK'S CERTIFICATE

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 696 inclusive, constitute the transcript of record upon the appeal from a Decree of said court in a cause therein numbered E-9581, in which Dallas Machine & Locomotive Works, Inc., a corporation, is plaintiff and appellant, and Willamette-Hyster Company, a corporation, and Clark & Wilson Lumber Company, a corporation, are defendants and appellees; that said transcript has been prepared by me in accordance with the amended designation of contents of the record on appeal filed by the appel-

lant, in accordance with the rules of Court and stipulation of the parties; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appear of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is \$135.35 and that the same has been paid by said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 25th day of October, 1939.

[Seal]

G. H. MARSH,

Clerk. [697]

[Endorsed]: No. 9342. United States Circuit Court of Appeals for the Ninth Circuit. Dallas Machine & Locomotive Works, Inc., a corporation, Appellant, vs. Willamette-Hyster Company, a corporation, and Clark & Wilson Lumber Company, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed, October 27, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9342

DALLAS MACHINE & LOCOMOTIVE WORKS,
INC., a corporation,
Appellant, (Plaintiff)

vs.

WILLAMETTE-HYSTER COMPANY, INC., a
corporation, and CLARK & WILSON LUM-
BER COMPANY, a corporation,
Appellees, (Defendants)

Appeal from Equity Cause No. 9581, from United
States District Court, District of Oregon

STATEMENT OF POINTS ON WHICH
APPELLANT WILL RELY

The above-named appellant in compliance with
Rule 19 of the Rules of the above-entitled Court,
hereby makes the following statement of Points on
which Appellant will Rely on its Appeal:

With regard to facts found:

1. Error of the District Court in failing to sus-
tain plaintiff's exceptions to the Master's Report
herein.

2. The District Court's 6th, 7th, 8th, 13th, 14th,
17th, 18th, 19th, 22nd, 23rd, 28th, 29th, 31st, 32nd,
and 33rd findings of fact, are and each of them is

erroneous, because not supported by, but contrary to the evidence in this case.

3. The District Court erred in that portion of its 11th finding of fact stating, "The only material difference in structure between that shown in Letters Patent No. 1,457,025 and the Nicholson machine is that in the latter the frame containing the load-lifting means is at the front end of the carrier, whereas, in the patent in suit the load-lifting means is mounted between the wheels", because not supported by, but contrary to the evidence in the case.

4. The District Court erred in that part of its 12th finding of fact stating that the operation of the load-lifting means of defendants' carriers asserted to infringe the patent in suit are similar to the teachings of the patent to French et al, No. 1,360,917, issued November 30, 1920, because such finding is not sustained by, but contrary to the evidence in the case.

5. The District Court erred in failing to find that there is a functional and patentable difference between the combination described by claim 4 of the patent in suit—whereby the operation of the four-point, independent, load-lifting means of a straddle-type carrier are rendered positive and uniform, and the devices employed for operating a platform lift, used in elevator and end-lift truck constructions.

6. The District Court erred in failing to find that the evidence in this case does not show antici-

pation of the combination described by claim 4 of the patent in suit.

7. Error in the finding of the District Court that the plaintiff discontinued the manufacture of its rack and pinion straddle-type carriers until 1935; the evidence showing that while the sale of these carriers was temporarily discontinued by plaintiff, and plaintiff manufactured instead for a time, hydraulic lift straddle-type carriers (on which plaintiff also has a patent) in the belief that the latter was superior in operation, which belief, however, was not substantiated in actual practice, and plaintiff resumed the sale of its mechanical lift straddle-type carriers described by the patent in suit, the early part of 1929.

With regard to the District Court's Conclusions of Law:

8. The District Court erred in its conclusions of law numbered 1 to 13 inclusive and each thereof, because not sustained by, but contrary to the evidence in the case.

9. The District Court erred in finding as a conclusion of law that the association of elements composing the combination defined by claim 4 of the patent in suit was a mere aggregation, and does not constitute a patentable combination.

10. The District Court erred in failing to find as a conclusion of law, that anticipation of the combination described of Claim 4 of the patent in suit was not made out, and that said claim is valid.

11. The Court erred in failing to find as a conclusion of law that since the combination described by Claim 4 of the patent in suit contains a new element, viz., load-lifting means which lift the load at the four, independent points of a straddle-type carrier, positively and uniformly, (the load-lifting element of prior straddle-type carriers being defective because not operating positively nor uniformly), it is immaterial as to the patentable novelty of said combination that it included other old elements, by which the positive and uniform movement of the load, up or down, is limited.

12. The District Court erred in failing to find as a conclusion of law that all the prior patents relied on by defendant as anticipating the invention defined by Claim 4 of the patent in suit are the same in principle of operation as the patent to Carr, No. 1,407,024, which patent was cited and considered by the Examiner of the Patent Office in passing on, and allowing the application for the patent in suit, as shown by the File Wrapper thereof; that the defendants had the burden of overcoming the presumption of correctness of the judgment of the Patent Office and the validity of the patent in suit issued in accordance therewith, but defendants failed to sustain this burden.

13. The District Court erred in failing to find as a conclusion of law that the combination of the load-lifting devices and automatic control thereof employed in the straddle-type carriers and manu-

factured and sold by defendant, Willamette-Hyster Company, and used by the defendant Clark-Wilson Lumber Company, are in principle of operation and result obtained identical with the combination set forth by claim 4 of the patent in suit, and constitute an infringement thereof.

14. Error in the District Court's conclusion, (stated in its opinion herein) that "neither the rack and pinion nor the four-point positive lift is specified in claim 4 is an essential of the particular combination, because contrary to the evidence in the case.

15. Error of the District Court in failing to find as a conclusion of law, that the combination defined by claim 4 of the Patent in Suit must be construed in connection with the explanation contained in the Specification of the patent, and that when so construed, it is obvious that the invention defined by claim 4 of the patent in suit does not relate to any type of self-propelling carriers, but relates to and designates specifically a straddle-type lumber carrier, "having four lifting points that lift positively and in unison", as stated in the introduction of the patent in suit.

16. Error of the Court in failing to find that there is no proof in this case that the delay of plaintiff in bringing suit on its patent was prejudicial to the defendant Willamette-Hyster Company or to defendant Clark & Wilson Lumber Company, in any way, and therefore defendants' plea of laches fails.

17. The District Court erred in failing to find as a conclusion of law that mere proof of delay of plaintiff in bringing suit on its patent against the defendant Willamette-Hyster Company who had direct knowledge thereof and infringe the same in spite of such knowledge, unaccompanied by proof of some injury sustained or disadvantage suffered by plaintiff by failure to bring suit earlier, does not establish laches.

18. Error of the District Court in failing to find as a conclusion of law that from defendant Willamette-Hyster Company's own statement that it had sold, up to the date of the trial of this cause, 300 straddle-type carriers alleged to infringe, and for which this defendant received about (\$2,000,-000.00), it must be presumed that said sales netted a profit to this defendant.

19. Error of the District Court in holding (as stated in its opinion) "That there are three parties concerned in a patent suit, the patentee, the alleged infringer and the public. In order to promote invention it is proper to grant a monopoly. It is however, in the interest of the public that as much of the art as possible be released from monopolistic control. While the characteristic of the patent is such that it is possible to lock up new developments, damage occurs to the public if another person is permitted over a series of years to place devices upon the market, while a patentee sits idly by and takes no action. Sufficient damage is here shown so that the doctrine of laches is applicable".

20. Error of the Court in failing to find as a conclusion of law that plaintiff is entitled to a decree for injunction and accounting against both defendants.

21. Error of the Court in denying the plaintiff all relief in the premises.

And appellant hereby designates the entire Transcript of Record, as certified by the Clerk of the United States District Court for the District of Oregon herein to the above-entitled court, as necessary to be printed for the consideration of said Appeal, except the following papers which are to be omitted, viz.:

1. Omit printing the paper No. 15 designated in "Appellant's Amended Designation of what shall be contained in the Record on Appeal", such paper entitled "Plaintiff's Objections to Proposed Findings and Conclusions of Law submitted by the Defendants";

2. Also omit printing paper No. 16, in said designation, such paper entitled "Plaintiff's Proposed Findings of Fact and Conclusions of Law which the Court refused to allow"; because such papers are superseded by the above Statement of Points.

3. Also omit printing Plaintiff's Exhibit 12, "Assignment of Patent in Suit to Plaintiff", and in lieu thereof, print the following Abstract:

Assignment Carl F. Gerlinger to Dallas Machine & Locomotive Works, Inc., dated July 2, 1928.

Patents Nos. 1,422,958 date of issue July 18, 1922
1,457,025 “ “ “ May 29, 1923
1,480,257 “ “ “ Jan. 8, 1924
1,609,018 “ “ “ Nov. 30, 1926
1,618,330 “ “ “ Feb. 22, 1927

Recorded, Transfers of Patents, U. S. Patent
Office, July 6, 1928, Liber N1-35, Page 43.

4. Also omit printing Plaintiff's Exhibits 49 and 50, being copies of mesne Assignments of Grab Patent to the Willamette-Hyster Company, and in lieu thereof, print the following abstracts:

Exhibit 49. Assignment by Gustav A. Grab to Willamette Iron & Steel Works, dated August 31, 1927 of Lifting Mechanism for Traversing Hoists, described in the specification executed July 2, 1927, filed July 23, 1927, Ser. No. 207,873 renewed under Ser. No. 455,927, filed May 26, 1930.

Recorded, Transfers of Patents, U. S. Patent
Office, November 30, 1931, Liber V-150,
Page 661.

Exhibit 50. Assignment by Willamette Iron & Steel Works to Willamette-Ersted Company, dated March 29, 1929, of Lifting Mechanism for Traversing Hoists described in Specification filed July 23, 1927, Ser. No. 207,873.

Recorded, Transfers of Patents, U. S. Patent
Office, November 30, 1931, Liber V-150,
Page 662.

The directions with regard to omission of above listed papers 3 and 4, and printing of said Abstracts in place thereof is in accordance with the Stipulation of the parties with regard to the Exhibits.

5. Also omit printing "Appellees' Designation of Additional Portions of the Record Proceedings and Evidence to be included in the Record on Appeal", since this designation is covered by "Appellant's Amended Designation of what shall be contained in the Record on Appeal".

Dated, Portland, Oregon, October 25th, 1939.

T. J. GEISLER

Attorney for Appellant, (Plaintiff)

District of Oregon,

County of Multnomah—ss.

Due service of the foregoing statement of Points on which Appellant will Rely on Appeal of the above-entitled cause, and Designation of parts of Record to be printed for the consideration of said Appeal, is hereby admitted.

Dated October 25th, 1939.

REYNOLDS, FLEGEL & SMITH

Attorneys for Appellees, (Defendants)

[Endorsed]: Filed November 2, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEES' DESIGNATION.

Come now the above named Appellees and in compliance with Rule 19 of the Rules of the above entitled court hereby designate additional parts of the record which they think material, to-wit:

1. That all exhibits marked with an asterisk or star in that certain stipulation described as "a Stipulation to transmit the original exhibits to the Circuit Court of Appeals", at Page 202 of the Transcript of Record on Appeal in the above entitled cause, which stipulation, filed October 18, 1939, is set forth at Pages 203 to 208* inclusive, of said Transcript, are regarded as material by both the above named appellant and the appellees and should be reproduced or set forth in the printed record herein in accordance with said stipulation, provided, however, that the abstracts of plaintiff's exhibits 12, 49, and 50 set forth in said stipulation and in appellant's designation of papers necessary to be printed for the consideration of the appeal, may be placed in said printed record in lieu of full copies of said exhibits; and provided further that in so far as it be acceptable to the above entitled court, the twelve copies of defendants' Exhibit 77 which were furnished the appellant in accordance with said stipulation, may be inserted in

*See pages 167 to 176 inclusive of this Printed Record.

the printed record in lieu of reproducing said exhibit, and if not acceptable to said court, then that said Exhibit 77 be reproduced in the printed record in the above entitled appeal.

That it was and is the mutual understanding of said appellees and of said appellant that said exhibits marked with an asterisk or star in said stipulation be so copied or set forth in said printed record and the same are referred to here solely by way of assuring said appellees that the same will be done.

2. That this additional Designation is regarded as material by said appellees and should be included in the printed record herein.

Dated at Portland, Oregon, November 1, 1939.

AUSTIN F. FLEGEL, Jr.,

PHILIP A. JOES

of Attorneys for Appellees
(Defendants).

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law is hereby accepted in Multnomah County, Oregon, on this 1st day of November, 1939.

T. J. GEISLER,

Attorney for Appellant
(Plaintiff).

[Endorsed]: Filed November 2, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION THAT CERTAIN EXHIBITS
BE OMITTED FROM THE PRINTED
RECORD.

It Is Hereby Stipulated by the above named Appellant and Appellees that an order may be entered in the above entitled court and cause authorizing the Clerk of said court not to cause to be reproduced in the printed record of this cause on appeal the following exhibits, heretofore stipulated and designated by the parties hereto for reproduction in the printed record on appeal, to-wit:

Complainant's exhibits 26, 27, 33, and 48 and

Respondents' exhibits 25, 58, 60, 63, 65, 67, and 70, provided however, that the aforesaid exhibits, and each of them, be available in original form for consideration by the above entitled court in the appeal of this cause, and provided further that in all other respects the stipulations and designations of the parties, relating to exhibits, remain in full force and effect.

Dated December 6, 1939.

T. J. GEISLER,

Attorney for Appellant

AUSTIN F. FLEGEL, Jr. and

PHILIP A. JOSS,

of Attorneys for Appellees.

[Endorsed]: Filed Dec. 9, 1939. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER AUTHORIZING CLERK TO OMIT
CERTAIN EXHIBITS FROM THE
PRINTED RECORD.

Based on the stipulation of the parties on file herein in the above entitled cause, It Is Now Hereby Ordered that the Clerk of this court be and he is hereby authorized to omit from the printed record of this cause on appeal the following exhibits, heretofore stipulated and designated by the above named parties for reproduction in the printed record on appeal, to-wit:

Complainant's exhibits 26, 27, 33, and 48 and

Respondents' exhibits 25, 58, 60, 63, 65, 67, and 70, provided however, that the aforesaid exhibits, and each of them, be available in original form for consideration by this court in the appeal of this cause, and provided further that in all other respects the stipulations and designations of the parties herein, relating to exhibits, shall remain in full force and effect.

Dated this 9th day of December, 1939.

CURTIS D. WILBUR,
Senior United States Circuit Judge.

O. K.

T. J. GEISLER

Atty for Applt

AUSTIN F. FLEGEL, Jr. and

PHILIP A. JOSS

of Attorneys for Appellees

[Endorsed]: Filed Dec. 9, 1939. Paul. P. O'Brien,
Clerk.